TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted].

EDGAR ALLEN WEST, PETITIONER,

vs.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF COMMERCE, MARITIME ADMINISTRATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE [redacted] CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 28, 1958

CERTIORARI GRANTED MARCH 2, 1959

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 541

EDGAR ALLEN WEST, PETITIONER,

vs.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF COMMERCE, MARITIME ADMINISTRATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

EDGAR ALLEN WEST, Appellant,

vs.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF COMMERCE, MARITIME ADMINISTRATION,

vs.

ATLANTIC PORT CONTRACTORS, INC.

APPEAL FROM FINAL DECREE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, NO. 419 OF 1952, IN ADMIRALTY

Appendix to Appellant's Brief

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DOCKET ENTRIES

October 30, 1952	Libel filed.
January 23, 1953	Answer filed.
January 23, 1953	Petition of U.S. under 56th Rule to implead Atlantic Port Contractors, Inc. filed.
January 27, 1953	Order to place case on trial list filed.
March 24, 1953	Answer of Impleaded Respondent to Petition under 56th Rule filed.
March 24, 1953	Answer of Impleaded Respondent to libel filed.
February 13, 1956	Trial witnesses sworn.
February 14, 1956	Trial resumed (findings to be sub.) C.A.V.

February 14, 1956	Motion of Impleaded respondent for a directed verdict and Order denying same filed.
March 5, 1956	Testimony filed.
August 2, 1956	Libellant's Requests for Findings of Fact and Conclusions of Law filed.
August 2, 1956	Proposed findings of fact and conclusions of law by United States filed.
August 2, 1956	Requests by Atlantic Port Contractors, Inc. for Findings of Fact and Conclusions of Law filed.
August 2, 1956	Opinion, Clary, J. Sur pleadings and proofs, with findings of fact and conclusions of law filed.
August 2, 1956	Order of Court entering judgment in favor of United States against libellant, and dismissing action under 56th Rule filed.
August 28, 1956	Libellant's petition for rehearing and reargument filed.
August 30, 1956	Order of Court denying libellant's petition for rehearing and reargument filed.
[fol. 2]	
September 28, 1956	Libellant's notice of appeal filed.
September 28, 1956	Copy of Clerk's notice to U.S. Court of Appeals filed.
November 7, 1956	Record transmitted to U.S. Court of Appeals.

[fol. 3]

IN UNITED STATES DISTRICT COURT

LIBEL IN PERSONAM—Filed October 30, 1952

To the Honorable, the Judges of the Said Court:

The libel and complaint of Edgar Allen West against the United States of America and United States Depart-

ment of Commerce, Maritime Administration, in a cause of action for damages, civil and maritime, allege to wit:

1. The respondent, United States of America, is a sovereign which has by law consented to be sued herein, and the respondent, United States Department of Commerce, Maritime Administration, which is the successor to the War Shipping Administration and United States Maritime Commission, is a governmental agency of the United States created by the Merchant Marine Act of 1936.

2. The United States of America, through the United States Department of Commerce, Maritime Administration, was at all times mentioned herein the owner of the S.S. "Mary Austin", which vessel at the times of the occurrences hereinafter related was operated for the account of the United States of America and the United States Department of Commerce, Maritime, Administration, as a merchant vessel under an agreement made between the said Maritime Administration and United States Lines Co.

3. Upon information and belief, libellant avers that at the times hereinafter mentioned United States Lines Co. managed, operated and conducted the business of the S.S. "Mary Austin" for and on behalf of the United States of America under an agreement of general agency.

[fol. 4] 4. On or about November 21, 1951, and at all times hereinafter mentioned, libellant was in the employ of Atlantic Port Contractors, Inc. in the capacity of marine engineer.

5. On or about November 21, 1951, and at all times hereinafter set forth, Atlantic Port Contractors, Inc. was engaged in doing certain repairs on board the S.S. "Mary Austin" by virtue of authority from and an understanding and agreement entered into with the said vessel's owners, charterers, operators and duly authorized representatives, including the respondents herein.

6. On or about November 21, 1951, libellant boarded the vessel to assist in making certain repairs thereon while the said vessel was berthed at a pier in the Port of Philadelphia pursuant to the aforesaid understanding and agreement.

7. On or about November 21, 1951, at or about 11:00 a.m., while the said vessel was in navigable waters moored to a pier in Philadelphia, Pennsylvania, libellant, in the course of his employment, was working in the lower part of the engine room when a large metal plug fell out of or was blown from a certain water feed line, and suddenly and without warning fell upon the libellant striking him and causing him to sustain the injuries which are more specifically set forth hereinafter.

8. Disregarding their duties in the premises, respondents, by their agents, servants, workmen and employees, were careless and negligent and the vessel was unseaworthy in;

[fol. 5] (a) failing to provide a reasonably safe place for libellant to perform his duties;

(b) failing to provide, install and maintain in proper, efficient, safe and operable condition the equipment, gear, appurtenances of the vessel;

(c) failing to provide the libellant with a water line and metal plug and apparatus connected therewith that were in a safe and proper operating condition;

(d) failing to furnish, install and maintain the water line and metal plug and appurtenances thereto on the said vessel in a proper, seaworthy, safe and efficient condition;

(e) failing to make a proper and adequate inspection of the said water line and plug and appliances appurtenant thereto and used in connection therewith to determine their proper, safe, efficient and operable condition and to determine the existence of any unseaworthy condition;

(f) failing to warn the libellant of the defective and dangerous condition of the said water line and plug;

(g) permitting the said water line and plug and appurtenances to fall into a state of disrepair;

[fol. 6] (h) failing to secure the said water line and plug in a safe, proper and seaworthy manner under the circumstances;

(i) permitting the said water line and plug to be used while the same was in an improper, unsafe and unseaworthy condition;

(j) failing to provide a safe and seaworthy vessel and equipment and to maintain same in a safe and seaworthy condition.

9. Solely by reason of the negligence of the respondents and the unseaworthiness of the vessel as aforesaid, libellant was struck as aforesaid; his chest, back, arms, legs and knees, and the muscles, tendons, ligaments and nerves attached thereto were severely bruised, wrenched, fractured and otherwise injured; he sustained a traumatic chondromalacia of the left patella; upon information and belief he sustained a crushing of the articular cartilage; upon information and belief he has sustained and will sustain in the future a severe traumatic arthritis; upon information and belief he will be required to undergo one or more surgical operations on the left knee; he sustained other injuries, the full extent of which are yet unknown; he suffered a severe shock to his nervous system; he has suffered excruciating aches, pains, mental anguish, shock and disability; he has been unable to assume his usual duties and occupation for a long period of time in the past, and [fol. 7] upon information, believes and therefore avers that his injuries have become aggravated and permanent and will permanently disable him from performing his usual duties and occupation in the future; he has in the past and will in the future be compelled to expend large sums of money for medical care and treatment, all to his damage in the sum of Seventy-Five Thousand ($75,000.00) Dollars.

10. On or about August 14, 1952, libellant made a proper claim for damages under the provisions of the Suits in Admiralty Act, 46 USCA 741-745, as amended, by mailing copies thereof, by registered mail, to United States Lines Co. and United States Department of Commerce, Maritime Administration, which claim has been disallowed.

11. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States of America and of this Honorable Court.

Wherefore, libellant prays that a citation in due form of law, according to the rules and practices of this Honorable Court, in a cause of admiralty and maritime jurisdiction, may issue against the said respondents herein citing them to appear and answer all and singular the matters aforesaid, and that libellant may have judgment for the amount of his claim aforesaid, with interest and costs and such other and further relief as the Court may deem just.

Freedman, Landy and Lorry, By /s/ William M. Alper, Proctors for Libellant.

[fol. 8] *Duly sworn to by William M. Alper, jurat omitted in printing.*

[fol. 9]

IN UNITED STATES DISTRICT COURT

ANSWER TO LIBEL—Filed January 23, 1953

To the Honorable, the Judges of the Said Court:

The answer of the respondent to the libel of Edgar Allen West admits, denies and alleges as follows:

First: Admits that respondent, United States of America, is a soversign, (sic) alleges that it is not required to answer the allegation concerning the United States Department of Commerce, Maritime Administration, and denies the remaining allegations contained in Article 1.

Second: Respondent admits the allegations in Article 2.

Third: Respondent admits the allegations contained in Article 3.

Fourth: Respondent denies knowledge or information sufficient to form a belief as to allegations of Article 4 and therefore denies the same and asks strict proof thereof.

Fifth: Respondent admits the allegations contained in Article 5.

Sixth: Respondent denies knowledge or information sufficient to form a belief as to allegations of Article 6 and therefore denies the same and asks strict proof thereof.

Seventh: Respondent denies knowledge or information sufficient to form a belief as to the allegations contained in Article 7 and therefore denies the same and asks strict proof thereof.

[fol. 10] Eighth: Respondent denies each and every allegation of Article 8 of the libel, including in particular subparagraphs (a) through (j).

Ninth: Respondent denies the allegations contained in Article 9.

Tenth: Respondent admits the allegations contained in Article 10.

Eleventh: Respondent denies the allegations contained in Article 11.

Further Answering the Libel and as a First Separate and Distinct Defense Thereto, Respondent Alleges, Upon Information and Belief:

Twelfth: That any injury received by libelant at the time and place alleged in the libel was caused by negligence of libelant himself, which negligence contributed to the cause of the accident and resulted in the alleged injury.

Further Answering the Libel and as a Second Separate and Distinct Defense Thereto, Respondent Alleges, Upon Information and Belief:

Thirteenth: The libelant's employment as alleged in the libel had certain risks incident thereto which were obvious and well-known to libelant at the time during the said employment and at the time when said employment was first entered upon, and that said risks were assumed by libelant and that whatever injury was received in the course of said employment and which was complained of in the libel, arose from and was caused by said risks, all of which were taken and assumed by libelant at all times during the continuance of said employment.

[fol. 11] Further Answering the Libel and as a Third Separate and Distinct Defense Thereto, Respondent Alleges, Upon Information and Belief:

Fourteenth: That any injury received by libelant as alleged in the libel was caused solely by the negligence and fault of persons other than respondent and was not due to any negligence or fault or want of care on the part of respondent.

Wherefore, respondent, United States, prays that the libel be dismissed and for its costs of suit and such other and further relief as to the Court may seem proper.

/s/ Gerald A. Gleeson, United States Attorney.

[fol. 12]

In United States District Court

Opinion—Sur Pleadings and Proof—August 2, 1956

Clary, J. August 2, 1956

This action was instituted by libellant, Edgar Allen West, against the United States of America to recover damages for injuries sustained aboard the S.S. "Mary Austin", a Liberty ship owned by the respondent, United States of America. The United States impleaded the libellant's employer, Atlantic Port Contractors, Inc. A trial was held before the Court, sitting without a jury, on February 13 and 14, 1956. Proposed Findings of Fact and Conclusions of Law, and briefs in support thereof, having been submitted by all of the parties, the Court makes the following

Findings of Fact

1. At all times material to this action, the S.S. "Mary Austin", a Liberty Ship, was owned by the respondent, United States of America, and was operated for the account of the respondent by United States Lines Co., under a General Agency Agreement, as a merchant vessel, under circumstances detailed hereafter.

2. Libellant, Edgar Allen West, also known as Eugene Albert West, was injured on November 21, 1951, while

working in the engine room of the S.S. "Mary Austin", in the capacity of marine engineer for the Atlantic Port Contractors, Inc. He was 66 years of age at the time of the accident.

[fol. 13] 3. From on or about November 5, 1951 to December 11, 1951, Atlantic Port Contractors, Inc. (Hereinafter called "Atlantic"), a ship repair corporation, was engaged in the performance of certain repairs on the S.S. "Mary Austin", pursuant to a contract between the United States and Atlantic.

4. Sometime after World War II the S.S. "Mary Austin", like many of her sister Liberty ships, was placed in the so-called "Moth Ball Fleet"; the ship was completely deactivated. As an essential part of the deactivation process all water pipes, boilers and tanks were drained and a special oil preservative was run through the system to prevent it from rusting; thereafter oil preservative was again run through the pipes, boilers and tanks from time to time, and each time the system was completely drained and left empty. When the S.S. "Mary Austin" was ordered reactivated, Government employees surveyed the vessel and prepared specifications of items requiring reconditioning, repair, or replacement. Bidders also made preliminary inspections and surveys and then submitted bids. On February 5, 1951, Atlantic was awarded the contract to do the necessary work for reactivating the S.S. "Mary Austin" according to specifications.

5. Under the terms of the repair contract, Atlantic was to completely overhaul the vessel; the specifications included cleaning and repairing all water lines, replacement of all defective or missing plugs and other parts, and the testing of all lines before closing and placing them in active [fol. 14] operating condition. The contract provided that the vessel be delivered into the possession of Atlantic, which was to have complete responsibility as to the manner in which the work was to be done during the progress of the work. After completion of repairs and final approval the vessel was to be redelivered to the United States.

In order to insure compliance with specifications, the right to inspect all work and material prior to final ac-

ceptance was reserved to the United States. The right reserved was a bare right to inspect; all control; and, as above mentioned, responsibility was with Atlantic. Also, by the terms of the contract, Atlantic agreed to provide a safe place to work for its own employees, and, in addition, to indemnify the United States against any liability for personal injuries resulting from "the fault, negligence, wrongful acts or omissions" of Atlantic.

6. The S.S. "Mary Austin" was towed to Pier 5, North, Philadelphia, Pennsylvania, on November 5, 1951, where it was delivered to Atlantic in accordance with the terms of the contract. Two days later, on November 7, 1951, the vessel was shifted to Pier 9, North, Philadelphia, where she remained until completion of the repair work; she left Pier 9 on December 11, 1951 under her own power. The record does not establish the exact time that Atlantic started work on the vessel, but, from the record, there can be no doubt that the manner and progress of the repairs were under the complete control of Atlantic from November 5, 1951 to December 11, 1951, when the repair work was completed.

[fol. 15] 7. The United States Lines Co. assigned one of its marine engineers, Thomas Cameron, as Port Engineer to the S.S. "Mary Austin". It was Mr. Cameron's responsibility to see to it that all work in connection with the reactivation was accomplished according to specifications and that a safely operating vessel was redelivered to the United States. His mode of operation was to inspect and test each item of the specifications as it was completed by the contractor. The United States Lines Co. also had six other persons assigned to the vessel: T. G. Karso, Master; A. A. Haus, Chief Officer; Jerome L. Greenberg, Second Officer; Arthur O'Conner, Chief Engineer; Charles Booth, First Engineer, and Jose Salguero, Chief Steward. These men were the officers, as designated, who sailed with the vessel on her first voyage after her reactivation. At the time of the accident, however, and at all times during the repairs, they had not signed Articles; they were merely on the United States Lines Co. weekly payroll. These six men performed some of the duties of a regular crew, but

they did not have control of the repair work, the manner in which it was performed, or the rate at which it progressed, and they did not have control of the ship in the ordinarily accepted context. Their chief function was to assist Mr. Cameron in inspecting the various items of work as completed and to help him discharge his duties efficiently. They were under Mr. Cameron's jurisdiction and had no independent right to grant approval of any job other than that which they derived through him. All had specific instructions not to interfere with the work or manner of [fol. 16] work of Atlantic's employees. They were to do no more than carry out routine inspections and watch the work as it progressed. If they saw a man performing a task in an unsatisfactory manner they were not to and actually did not correct the situation themselves but rather reported their complaints to Atlantic supervisors, who in turn had the situation corrected. The record establishes to the satisfaction of the Court that Mr. Cameron and all his subordinates conformed to this practice.

8. The Libellant was injured at about 11 A.M. on the morning of November 21, 1951, while he was working inside the low pressure cylinder of the main engine. He was kneeling on his right knee when a one inch pipe plug struck his left knee. At the time libellant believed that the plug, which weighed about a quarter of a pound, had been dropped by one of his fellow workers while working above him in the engine room and, although he now denies it, the Court believes that at the time he accused a number of persons of having dropped the plug. The record fails to establish that any group or individual was working above libellant at the time. Although the plug was not produced at the time of trial and the explanation of its absence is not satisfactory (Libellant merely claimed he could not find it), the record leaves no doubt that a plug did strike the libellant's left knee and that (1) it either fell from one of the pipes or tanks above the low pressure cylinder in which libellant was working, or (2) was dropped by an Atlantic workman. The presence of a small quantity of water on the engine room floor immediately after the accident would indicate the probability of the first conjecture.

[fol. 17] 9. The libellant was helped out of the engine room, off the vessel and onto the dock. He was then taken to Dr. L. J. Farmakis who aspirated 20 cc. of fluid from the prepatellar bursa, wrapped the knee with an elastic bandage and arranged for X-rays. The X-rays were taken at Jefferson Hospital on November 24, 1951 and proved negative for fracture. Dr. Farmakis again saw and treated libellant on November 23, 26, 27, 28, 30 and December 3, when he referred him to Dr. Theodore E. Orr at the Travelers Insurance Company Clinic. Dr. Orr saw and treated the libellant a total of 13 times from December 4, 1951 to July 21, 1952. In addition, all during this period of time the libellant visited Travelers' Clinic an average of three times a week for physiotherapy treatments. On July 21, at the time of libellant's last visit to the clinic, Dr. Orr was of the opinion that further physical therapy treatments would not bring about any further improvements and discharged the libellant as ready to return to work.

10. At the time of trial libellant testified to injury not only to his knee but also to his stomach. The record clearly establishes that all prior complaints and treatments were for a knee injury only and there is no basis for the now claimed stomach injury.

11. At the time of his discharge by Dr. Orr in July, 1952, libellant had a free, non-painful range of motion from 180 degrees, in a straight line, to 80 degrees. There was no swelling, no evidence of crepitation, nor was there evidence of instability of the knee. Libellant complained of pain when he used his leg but this Dr. Orr attributed to atrophy of the quadriceps muscle, which condition resulted from [fol. 18] nonuse of the leg and which would be corrected after the libellant again started to use his leg. While libellant now has a slight narrowing of the joint space in the knee, the cause lies in his advanced age rather than trauma. The Court is satisfied that whatever discomfort libellant may have suffered after July, 1952, it was of no greater degree than that which he suffered before his injury on November 21, 1951. Libellant claimed at trial that he had never had any trouble with his leg prior to the time the plug struck his knee. The number of witnesses who tes-

tified that they had seen him limping for some time prior to the accident, that libellant had complained about the trouble he was having with his knee, and the fact that he was specifically given the job of working in the low pressure cylinder so that he would not have to climb convinces the Court that a painful knee condition existed prior to the time of the accident. Whatever discomfort libellant suffered after July, 1952, was due to the pre-existing conditions and not the accident.

12. Soon after he was discharged as capable of resuming work, libellant, in August, 1952, received a medical examination prior to starting work for Todd Shipyards. Said examination revealed no knee condition whatsoever and libellant, being otherwise fit, immediately started work as a boilermaker at Todd's. His job included climbing ladders and scaffolds and there was no indication of any trouble with his knee; the record establishes that libellant carried a normal working load and performed his work in a normal and entirely satisfactory manner. Libellant worked regu- [fol. 19] larly at Todd Shipyards until he was injured in a fall from a scaffold. From July to November, 1953, libellant worked as an inspector of freight elevator doors for Gilbert Company. Although he was discharged from Gilbert's, his employment was not terminated because of any physical condition. This subsequent work record clearly supports the opinion of Dr. Orr that libellant's knee injury was not permanent in nature nor did it limit him to sedentary work. After July, 1952, libellant's injury of November 21, 1951, did not impair his earning capacity.

13. At the time of his injury libellant had a potential earning capacity of about $6,000 a year. His work record was very irregular however and no satisfactory record of previous earnings was introduced into evidence.

14. Respondent was not guilty of negligence.

15. The S.S. "Mary Austin" was in reasonably satisfactory condition for reactivation purposes and to that extent was not unseaworthy.

16. No unseaworthy condition of the S.S. "Mary Austin" contributed to libellant's injury.

17. Libellant's total damages, including loss of wages, pain, suffering and inconvenience, are $5,000.00.

Discussion

The libel in this action charges that libellant was injured solely by virtue of the negligence of the respondent and the unseaworthiness of the S.S. "Mary Austin"; and, further, that the respondent was negligent and the vessel unseaworthy in failing to provide libellant with a reasonably [fol. 20] safe place to work, failing to provide, install and maintain the water line and plug in a safe and operating condition, failing to inspect and discover the unsafe condition and failing to warn libellant of the unsafe condition. The Answer denies that respondent was negligent or the vessel unseaworthy; it further alleges that the libellant himself was negligent and that he assumed the risk of his employment, and, as a separate defense, the Answer alleges that any injury received by libellant was due solely to the negligence or fault of "persons other than the respondent". Simultaneously with the filing of its answer to the libel the respondent impleaded Atlantic, alleging that any injuries suffered by libellant were the result of the negligence or fault of Atlantic and that the United States is, in any event, entitled to indemnity for any damages collected against it by virtue of the terms of the contract between the United States and Atlantic.

The issues presented by this action can be divided into three phases, each lending itself to separate discussion. The first phase of this action goes to unseaworthiness. Here we must determine whether a shipowner is liable for injuries caused by an unseaworthy condition to a shoreside repairman employed by a ship repair contractor when the cause of the injury was a condition which the contractor was required to inspect, repair and test to make sure that it was seaworthy. Then, we must determine if, under the circumstances, the S.S. "Mary Austin" was unseaworthy and, as a corollary, whether the injury was caused by the unseaworthy condition. The second phase concerns negligence. Here we must determine whether the United States had a duty to provide libellant with a safe place to work,

whether it failed in that duty and whether the injuries were caused because of the United States' failure to discharge [fol. 21] that duty. The last phase arises only if there is liability on the part of the respondent, for if libellant recovers any damages we must then determine whether under the terms of the contract between the United States and Atlantic, the United States is entitled to recover against Atlantic by way of indemnity.

Seaworthiness

The leading case on the question of whether a longshoreman may recover for injuries sustained while working aboard a ship due to an unseaworthy condition is *Seas Shipping Co., Inc. v. Sieracki*, 328 U.S. 85 (1945). In that case a longshoreman was injured while loading a ship when a defective shackle supporting a loading boom broke causing the boom to fall on the longshoreman. The District Court found that the condition which caused the injury was due to a defect in the forging of the shackle and that the shipowner, having no obligation to test for such defects, was not negligent. The question therefore became whether the absolute duty to provide a seaworthy vessel, an obligation traditionally owed by the owner of a ship to seamen, extended to a stevedore injured while working aboard a ship. The Court held "that for injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protections, regardless of the fact that he is employed immediately by another than the owner. For these purposes he is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards". The Court noted that the task being performed by Sieracki, loading a ship, was one traditionally done by seamen and that the policy underlying a seaman's recovery should be continued despite present day practices of specialization and division of labor. The minority opinion took the position that the [fol. 22] longshoreman was subject to the conditions which entitled a seamen (sic) to indemnity for injuries attributable to unseaworthiness, namely, those of a ship's discipline and the hazards of the sea, and, further, that Congress

had recognized this in its enactment of the Longshoreman's and Harbor Worker's Act, 33 U.S.C. 901.

In Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953), the Sieracki decision was used as the basis for extending a shipowner's warranty of seaworthiness to a shoreside carpenter making minor repairs on loading equipment of a ship. The relationship of the libellant's work to the loading of the ship provided the basis for recover. (sic) At page 413, the Court said:

> "The ship on which Hawn was hurt was being loaded when the grain loading equipment developed a slight defect. Hawn was put to work on it so that the loading would go on at once. There he was hurt. His need for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of the seamen who had been or were about to go on a voyage."

Mr. Justice Jackson, who did not participate in the Sieracki decision, thought the extension of the doctrine of unseaworthiness to a repairman to be completely "illogical" and this, for the same reasons advanced in the dissenting opinion of the Sieracki case.

Both the Sieracki and Hawn cases involved shoreside workers who had some contact with the ship's loading equipment. A close study of these cases shows that the basis of these decisions does not rest in the name given to the person doing the work—seaman, longshoreman or repairman—but rather the nature of the work in which he is engaged. Broadly stated, the principle of law laid down in the afore-[fol. 23] said cases is that if a person is engaged in the "service" of the ship, and the service is one traditionally performed by seamen, then the warranty of seaworthiness runs to that person. We need not decide whether, in this Circuit, the principle has been limited by *Bruszowski v. Isthmian S.S. Co.*, 163 F. 2d 720 (C.A. 3, 1947), 66 F. Supp. 260 (D.C. E. Pa., 1945). In the instant case the libellant was engaged in major repairs to the boiler system of a ship which was being reactivated. The ship did not have a crew and it did not come from the sea seeking the services

of specialists within the meaning of the Sieracki opinion. In *Guerrini* v. *United States*, 167 F. 2d 352 (C.A. 2, 1948), conjecturing on the possible limits of the Sieracki doctrine, Circuit Judge Learned Hand at page 354 said:

> ". . . everything done on board a ship contributes to her 'service', if it helps to make and keep her ready for her work; and probably all but majoral structural repairs were; at least in early time and elsewhere than in the home port, often made by the crew."

This case presents about as close an approximation to home port structural repairs as analogy will allow. The work here being done was not of the type ordinarily performed by seamen and does not fall within the doctrine of the Sieracki and Hawn cases.

Except for the fact that the S.S. "Mary Austin" was afloat, this case parallels *Desper* v. *Starved Rock Ferry Co.*, 342 U.S. 187 (1951). There libellant's decedent was employed by the operator of a fleet of motorboats carrying sightseers during the summer months. After each season the boats were beached and put on blocks for the winter. At the time of the injury libellant's decedent was engaged [fol. 24] in preparing the boats for navigation. In affirming the Court of Appeals' reversal of a Judgment for the libellant under the Jones Act, the Court said: "The work in which the decedent was engaged at the time of his death quite clearly was not that usually done by a "seaman". The boats were not afloat and had neither captain nor crew. They were undergoing seasonal repairs, the work being of the kind that, in the case of larger vessels, would customarily be done by exclusively shore-based personnel." The fact that the S.S. "Mary Austin" was afloat is not controlling; although, it should be noted that she most certainly was in her then condition not a navigable vessel and, as stated by the Supreme Court in the Desper case, at page 191:

> "It is our conclusion that while engaged in such seasonable repair work Desper was not a "seaman" within the purview of the Jones Act. The distinct nature of the work is emphasized by the fact that there was no

vessel engaged in navigation at the time of the decedent's death."

It is the nature of the work being performed by the libellant which takes him out of the class of persons to whom the warranty of complete seaworthiness runs. For this reason, the fact that the libellant was working on the low pressure cylinder of the ship, a unit distinct and apart from the pipes and boiler in which the situation which caused the injury existed, is of no consequence. The entire reactivation processes were outside the scope of the Sieracki opinion and this being so, the United States, as owner of the S.S. "Mary Austin", cannot be charged with having warranted to libellant a completely seaworthy vessel.

[fol. 25] NEGLIGENCE

The United States concedes, as indeed it must, that it was under a duty to provide libellant with a safe place to work and that this duty was a nondelegable one. The question presented is the nature and extent of that duty. Unlike the distinct and sometime overlapping duty to provide a seaworthy vessel and appurtenances, a shipowner's duty to provide a safe place to work is not an absolute duty; rather, it is a requirement of reasonable care under the circumstances. Brabazon v. Belships Co., Ltd., 202 F. 2d 904, 906 (C.A. 3, 1950), see opinion of Chief Judge Kirkpatrick, 87 F. Supp. 203, 205 (D.C. E. Pa., 1949). Thus, an appraisal of the particular facts and their impact upon reasonable behavior becomes necessary. The S.S. "Mary Austin" was towed to Pier No. 5, North, Philadelphia, on November 5, 1951. Its water tanks and pipes were completely drained. Nothing in the condition of the vessel as it then stood could have caused the libellant's injury. It was only after something was done to alter the conditions of November 5, 1951, that made the area in which libellant worked a potentially unsafe place to work. That "something", of course, was the placing of water and the pressure resulting therefrom, into the pipes and tanks. This was done not by the respondent but by the members of the reactivation crew, employees of Atlantic. That loosely

fitted plugs might be present and not able to withstand the application of pressure is certainly not surprising. That very fact was one of the reasons that the ship was being repaired and whatever precautions should have been taken when water was first placed into the lines should have been [fol. 26] taken by Atlantic. Respondent can be held liable for the actions of Atlantic's employees only if it had a right (and therefore the correlative duty) to control the acts of these men or did so in fact. I have already noted that the contract between the United States and Atlantic required the delivery of the S.S. "Mary Austin" to the possession of Atlantic and the right to control the manner in which the work was done exclusively with Atlantic; the only right reserved to the United States was the right to inspect the work after its completion and either accept or reject it. The record presents contradictory testimony as to whether the employees of United States Lines Co. did in fact direct the men in their work and exercise control over the manner in which the work was being done. Questions of credibility are always troublesome. Based upon the entire record, the numerous inconsistencies in the libellant's testimony at the time of trial with either prior statements or existing facts, the interest of the witnesses as well as their manner and demeanor on the witness stand, the Court has found (Findings of Fact No. 7) that the respondent did not exercise any control over the employees of Atlantic. Rather they followed the pattern there outlined. Thus, there was no actionable wrong on the part of the United States in either the form of acts of commission or omission, before or after its delivery of the S.S. "Mary Austin" to Atlantic for reactivation and it, therefore, is not guilty of negligence.

Indemnity

Decision of the remaining question as to the right of the United States over and against Atlantic is not really necessary in view of the conclusions set forth above. However, [fol. 27] the Court has no hesitation in stating that, if its conclusions were otherwise and it had held that the facts of this case entitled libellant to a recovery under the Sieracki case, the United States would be entitled to judg

pient over and against Atlantic for the full amount of libellant's damages. The testimony as to the happening of the accident and the entire surrounding circumstances has convinced the Court that the primary fault for this occurrence rests with Atlantic. There were no plugs of the kind described located immediately above the point where libellant was working and pressure was required to cause the plug to fall in such a manner as to strike the libellant. The primary fault, therefore, can be ascribed to the conduct of Atlantic's employees. In that event, the accident having happened from the "fault, negligence, wrongful acts and omissions" of Atlantic, the United States would be entitled to full indemnity under the terms of the contract.

Conclusions of Law

1. The Court has jurisdiction of the parties and the subject matter of this suit.

2. The respondent, United States of America, under the facts of this case did not owe the duty to provide a completely seaworthy vessel to the libellant, a shoreside worker engaged in the reactivation processes of the S.S. "Mary Austin".

3. The "service" being rendered by the libellant aboard the S.S. "Mary Austin" was not one traditionally done by seamen.

[fol. 28] 4. The condition of the S.S. "Mary Austin" when delivered by the United States of America to Atlantic for reactivation purposes only did not constitute the S.S. "Mary Austin" an unseaworthy vessel.

5. The respondent's duty to provide libellant with a safe place to work is not an absolute duty, but rather a requirement of reasonable care under the circumstances.

6. The respondent did not breach its duty to provide libellant with a reasonably safe place to work.

7. The respondent is entitled to judgment in its favor.

An appropriate order will be entered.

[fol. 29]

IN UNITED STATES DISTRICT COURT

ORDER ENTERING JUDGMENT—August 2, 1956

And Now, to wit, this 2nd day of August, 1956, in accordance with the Findings of Fact and Conclusions of Law sur Pleadings and Proof filed concurrently herewith, it is

Ordered, Adjudged and Decreed that judgment be entered in favor of the respondent, United States of America, and against the libellant, Edgar Allen West.

It is further Ordered, Adjudged and Decreed that the action of the respondent, United States of America, over and against the impleaded respondent, Atlantic Port Contractors, Inc., be and it is hereby Dismissed.

By the Court, /s/ Thomas J. Clary, J.

[fol. B]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

EDGAR ALLEN WEST, Libelant-Appellant,

v.

UNITED STATES OF AMERICA, Respondent-Appellee,

v.

ATLANTIC PORT CONTRACTORS, INC., Respondent-Impleaded-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Appendix to Appellee's Brief

[fol. C]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Excerpts From Transcript of Evidence

Before Hon. Thomas J. Clary, J.

APPEARANCES

Present: Joseph Weiner, Esq., for the Libellant; Arthur R. Littleton, Esq., Assistant United States Attorney and Carl C. Davis, Esq., Trial Attorney, Department of Justice, Washington 25, D. C., for the respondent; Thomson F. Edwards, Esq., (for J. B. H. Carter, Esq., for Atlantic Port Contractors, Inc., respondent-impleaded; George W. Hoft, Esq., (for George F. Shinehouse, Jr., Esq.), for Atlantic Port Contractors, Inc., respondent-impleaded.

[fol. 1] Mr. Weiner: May it please the Court, this is an action for personal injuries by a shoreside employee who was injured on November 21, 1951, while working aboard the "Mary Austin."

May I proceed to call the libellant, sir?

The Court: Yes.

Mr. Weiner: Mr. West.

* * * * * * * *

Q. When were you born, sir?

A. I was born September 18, 1885.

Q. Will you tell us what your educational background is. Are you a college graduate?

A. Yes, sir.

Q. What college and what year?

A. 1910, University of California, Berkeley.

Q. What did you receive your degree in?

A. B. S.

Q. In what?

A. Engineering.

Q. After you graduated in 1910, will you tell us generally what your earning record was, what companies you were

employed by, the kind of work that you were doing, and the money that you earned.

A. Well, I worked for the Standard Oil for a great many years in foreign service constructing refineries. I worked for Stone and Webster on power plants, American Smelting and Refining, and several others that I can't hardly remember all of them.

Q. In what capacity did you work for them? As an engineer?

A. As an engineer.

Q. Can you tell us your average earnings per year while you were so employed?

A. How is that?

[fol. 2] Q. Can you tell us generally your average earnings, the amount of money that you made a year?

A. Well, I was in foreign service. Some years I averaged from seven to ten or eleven thousand dollars a year.

Q. Now, Mr. West, you were employed aboard the "Mary Austin" on November 21, 1951?

A. Yes, sir.

Q. What kind of ship is that?

A. Why, that is a Liberty boat.

Q. How long had you been employed aboard that vessel on that day?

A. How long?

Q. Yes.

A. Well, I had been there a few months, I think, working for the company.

Q. How long had you been on this particular ship?

A. I had been on this ship from the day that she came in.

Q. And what were your duties aboard the vessel?

A. Well, my duties when I went aboard, the foreman that hired me there to work on engines, pops around the boilers, and to give him a hand in general.

Q. What company were you working for, sir?

A. I was working for the Atlantic Port.

. . . . . .

Q. Mr. West, will you tell us the nature of your duties aboard this particular ship during the time that you were employed aboard her. Will you tell us the type of work

that you were doing on this ship while you were working on her.

A. Well, this foreman that I went to work for, he was a personal friend of mine. He told me to come down and go to work for him. I went to see Mr. Winters. He was assistant superintendent. They were the only ones I ever came in contact with. We started off with the pops on the boilers, repaired the boilers, then from there to the engines.

* * * * * * *

[fol. 3] Q. This work that you did aboard the ship, Mr. West, was all or any part of it performed in the engine room of the ship?

A. Yes, it was in the main engine room.

Q. Calling your attention again to November 21, 1951, did you sustain any injury aboard the ship that day?

A. I did.

Q. Incidentally, when you were hired for this job, what was the condition of your health?

A. What were the conditions?

Q. What condition was your health in?

A. My health was A-1 condition.

Q. When you reported for work on November 21, 1951, what was the condition of your health?

A. Very good.

Q. Now, calling your attention again to that day, November 21, 1951, were you injured at work that day?

A. Yes, sir.

Q. Will you explain to His Honor just exactly what happened to you on that day.

A. Well, on that day I was in a low-pressure cylinder working on rings.

Q. This is the low-pressure cylinder of the main engine?

A. On the engine, yes. I was down in the engine and I was down on my right knee, because I had to stoop all the way down to the bottom of the engine to work on the rings, when some dirt or something came down, and I happened to look up, and I saw no one up there but the first assistant, Mr. Boothe. Well, when the dirt stopped coming down, I went back to work, and it was just maybe a fraction of a minute or two that something hit me on the knee and bounced over in the cylinder, and I picked it up, and by

that time I was in kind of a coma. I fell down, and the water was coming down. This plug came from up above, not exactly overhead, but from near overhead, and I hollered, and Mr. Skelton, the fellow that has charge of the cleaners, his men came up. I tried to get out of the engine. [fol. 4] I had a little box there. I couldn't climb out, but they helped me out, and they carried me up on deck and laid me on the fiddley.

Q. Mr. West, before we go any further, let us just clarify some of the matters. You say you were working in the low-pressure cylinder of the main engine?

A. Yes, sir.

Q. Had that low-pressure cylinder been torn apart?

A. Yes, sir.

Q. Was it open?

A. Yes, sir.

Q. Were you actually inside the cylinder?

A. Yes, sir.

Q. How deep is the cylinder itself?

A. Well, I should say the cylinder was at least 60 inches across, I judge. I wouldn't swear just what that was.

Q. You mean the diameter of it?

A. Yes, the diameter.

Q. My question was, how deep was it?

A. Well, it was, I should say, at least—I know that my head would just come up—when I was standing up in there I could just get my head a little bit above the top of it.

Q. In other words, when you were standing on the bottom of this cylinder, the top edge of it came up just below your neck; is that about right?

A. Well, I wouldn't swear just what that was.

Q. Now, you say you were working down in there when this object struck you on the knee; is that correct?

A. Yes, sir.

Q. Which knee did it strike you on?

A. It struck me on the left knee.

Q. Do you know where this object came from?

A. Well, I think—

Q. Mr. West, just a moment, please. You are not allowed to testify as to what you think. You are only allowed to testify as to what you know.

Now let me ask you the question again. If you know the [fol. 5] answer, tell me. Do you know where this plug or this object came from?

A. I wouldn't swear where it came from. I know it came from overhead, Mr. Weiner.

Q. It came from overhead where you were working?

A. Yes, It either came out of the pipe line or one of the tanks, because the water immediately followed afterward.

Q. Now, do you know what this object was that struck you?

A. It was a plug, a pipe plug.

Q. What material was it made of?

A. It was made of cast iron, pipe plug.

Q. Now, after it struck you, what happened to you?

A. What?

Q. After this object struck you on the knee, what happened to you?

A. Well, when that knocked me over, I was kind of stunned, in a coma for a while. I fell back and I started to holler for them. I tried to get out on this box, but I couldn't make it, and I hollered, and these men came over and said, "Wait, West, we will get you out," and they pulled me out and carried me up on the top.

Q. What was the condition of your knee at that point, so far as you can see?

A. My knee, I pulled my pants leg up, it was three times the normal size.

Q. Was it or was it not painful?

A. It was very painful.

Q. Could you walk unassisted at that point?

A. No, sir.

Q. After you were taken up out of the cylinder, what was done for you or where were you placed?

A. Well, when they took me out, they packed me down to the end of the dock. Mr. Winters told them to take me to the hospital. Then they put me in a taxicab and took me up to the company doctor.

[fol. 6] Q. Incidentally, on the "Mary Austin" on that day was any of the ship's equipment operating?

A. Yes.

Q. What equipment, if you know?

A. I think the dynamo was going and the pumps and the boiler.

Q. After you were taken on the dock, then what happened to you? What did you do?

A. Well, when they took me on the dock they helped me up to the head of the dock and called a taxicab.

Q. And where were you taken?

A. I was taken up to the company doctor.

Q. Do you know the name of that doctor?

A. I can't recall his name. I went to him several times.

Q. Where was his office?

A. His office was up four or five blocks away, up on Second Street, I think.

Q. You don't recall his name at the moment?

A. No, I can't remember his name, because I didn't know him very well, and I didn't come in contact with him very many times.

Q. Did the doctor treat you that day?

A. Yes.

Q. What did he do for you?

A. He put me on the table and he took the blood out of the knee.

Q. How did he take it out?

A. Well, he injected something in there and sucked it out.

Q. Out of which knee, sir?

A. Out of my left knee.

Q. What else did he do for you?

A. Well, he bandaged it up, and one of the — I think the nurse helped me downstairs and I got a taxicab, and he told me to come back in a couple of days.

Q. Incidentally, in this incident was any other part of your body injured aside from your left knee.

[fol. 7] A. Yes, across the stomach here when I fell over.

Q. Did you return to this doctor's office for further treatments?

A. I returned to the doctor every two or three days. I can't remember just how many times.

Q. For how long a period of time did you continue to be treated by this doctor?

A. I think I was treated by this doctor about approximately two weeks.

Q. And then what was done?

A. Why, he said they had to take me to the hospital or let the Travelers Insurance Company, they had a hospital, and they were going to take over the case.

Q. To what doctor were you transferred, if you know?

A. To the chief surgeon, Dr. Orr, of the Travelers Insurance Company.

Q. And did you continue under treatment under the direction of Dr. Orr?

A. I continued under treatment of Dr. Orr for several months.

Q. Do you recall when you last saw Dr. Orr or were treated at his clinic?

A. Recall the last time?

Q. Yes.

A. I think it was in the middle of 1952 somewhere, along in June maybe.

Q. Incidentally, going back to the accident which you had, Mr. West, can you tell us whether on the morning of the accident before you were injured you had seen or had not seen any employees of Atlantic Port Contractors working above you in the engine room?

A. No, sir, I saw no one.

Q. What was the nature of the treatment that you received at Dr. Orr's clinic?

A. Well, they were heat treatments.

Q. Were any x-ray taken of your knee?

A. Yes, several x-rays.

[fol. 8] Q. You say that the last time you saw Dr. Orr was about the middle of 1952?

A. That's right.

Q. Had you done any work of any nature up until that time?

A. No, I did no work up-till then.

Q. Were you able to work?

A. No, sir.

Q. Now, after the middle of 1952, the last time that you saw Dr. Orr, did you receive any treatments from any other doctors or hospitals for the condition of your knee?

A. No. I went down to Baltimore, and I went to a specialist, and they told me, the only thing, I got a heat lamp, one of those lamps, but that didn't do me no good. My knee still continues to lock at times that I can't move it.

. . . . . .

Q. Do you recall when you next performed any work of kind?

A. Well, I never performed any work, I don't think, till in 1953, when I was up in Brooklyn. They wanted an inspector there for a few weeks for the Robbins Dry Dock, and to get that job, if I hadn't had a special pull in there I couldn't have gotten it, because the doctor wouldn't—I had to sign some kind of agreement in case anything happened to me.

Q. How long did you work up there, sir?

A. I couldn't say how long, but I knew I made about $800 or $850, something along there.

Q. Could you tell us whether you worked there for a week, a month, or a year?

A. It couldn't have been over two months, a little over.

Q. Now, in addition to this job at Robbins Shipyard which you have just told us about, have you worked anywhere else since the accident on the "Mary Austin"?

A. Yes, I worked for an elevator man here in Philadel- [fol. 9] phia. I was chief inspector out there for three or four months.

Q. Do you know the name of that outfit?

A. I can't recall the name now. I told you the name there. I gave you that slip with his name on.

Q. When did you work there, Mr. West?

A. I worked there from, I think in 1954, from along about July or August, for two or three months, maybe four months.

Q. How much did you earn with them?

A. I made between, something close to fourteen or fifteen hundred dollars.

. . . . . .

Q. Mr. West, did you ever injure that knee before this accident in November of 1951?

A. No, sir.

Q. Did you have any trouble with it before this accident?

A. No, sir. In fact, I played with the Elks baseball club the year before that in Brooklyn. That leg was in perfectly good shape, never gave me any trouble.

* * * * * * *

Cross examination.

By Mr. Davis:

Q. Mr. West, I believe you testified that you were born in 1885; is that correct?

A. September 18, 1885. Now, about the dates down there, you know, when a man gets over 65, the Social Security, of course, that takes care of it, but lots of times we shove our age back a little bit, and I never thought it was any crime to tell a man I was a few years younger to get a job.

Q. You wouldn't shove it forward, though?

A. What?

[fol. 10] Q. You wouldn't shove your age forward, would you?

A. No.

Q. I hand you a document "Employee's Optional U. S. Individual Income Tax Return for 1951." Is that your signature?

A. Yes, sir, that's my signature.

Q. And you wouldn't shove your age forward?

A. No, sir.

Q. It says here: "Check below if on December 31, you or your wife were 65 or over." Did you check that, Mr. West? Is there a check there?

A. I checked—I told you that my birth—I have my birth certificate.

Q. I asked you if you checked that you were 65 or over.

A. I don't remember that.

Q. There it is, you are looking at it.

A. Yes.

Q. You checked it, didn't you?

A. That was in 1951?

Q. That was in 1951.

A. I don't think I was quite 65 at that time.
Q. Did you check that you were over 65?
A. No, sir, I did not check it.
Q. Is that your signature?
A. That's my signature there.
Q. Your testimony is that you did not check it?
A. I don't think I checked it, because I told the truth there. That is what my birth was.

Mr. Davis: Your Honor, I would like to offer into evidence this certified copy of the 1951—

The Court: You may have it marked and at the proper time offer it. It is not your case yet. Let the reporter mark it, however.

(1951 income tax return for E. A. West was marked U. S. Exhibit 1 for identification.)

The Court: What is the date of that document?
[fol. 11] Mr. Davis: 1951, Your Honor.
The Court: What is the date of the paper that you showed him?
Mr. Davis: Your Honor, it is undated.
The Court: He became 65, according to his own testimony, in 1950.
Mr. Weiner: That is right, sir.
The Court: On September 18, 1950, he became 65 years of age, if his present story is true as to the birth.
Mr. Davis: I have some other aspect relating to the dates.
The Court: It just strikes me that in 1951 he would be 65 plus and perhaps 66.
Mr. Davis: Yes.

By Mr. Davis:

Q. Do you recall that on December 22, 1954, in the presence of your attorney, Mr. Lakatos at that time, you gave testimony in the Philadelphia Fidelity Building on the accident which resulted in the injury to your knee?
A. Will you speak a little louder, please.
Q. Do you recall on December 22, 1954, having given testimony in the presence of your attorney, Mr. Lakatos?
A. Yes.

Q. With respect to the alleged accident causing the injury to your knee?

A. No, I don't remember that. I remember when we had that down there. That is kind of misty to me. We had three lawyers, and the assertions and things that I made at that time, I couldn't know just what they were.

Q. Do you remember giving testimony?

A. I remember giving testimony, but what it is I could not say.

Q. Well, you testified here today, did you not, that before November 21, 1951, you had had no trouble with your left knee?

A. I never had any trouble till it was hurt on that "Mary Austin."

[fol. 12] Q. Well, isn't it a fact that even before November 21, 1951, you told various people that you were suffering from a bad left knee?

A. I told no one that, at no time.

Q. You told no one that?

A. No, sir, no one.

Q. And you also testified that several months prior to your working on the S. S. "Mary Austin" in 1951, you had been working on other vessels for Atlantic Port Contractors?

A. How is that? Let me hear you a little bit more clearly.

Q. I said, you also testified, did you not, that prior to November 21, 1951, and prior to your working on the S. S. "Mary Austin," you had worked on other vessels for Atlantic Port Contractors?

A. I did work on them, but not very long.

Q. When you were working on these other vessels for Atlantic Port Contractors, who was your supervisor?

. . . . . .

Q. Was it Robert Kirchoff?

A. No Kirchoff was a superintendent at that time, but I never had a dozen words with Mr. Kirchoff in my life, never spoke over twelve words with him. He never hired me, and I never came in contact with him.

Q. And while you were working for Atlantic Port Contractors on other vessels prior to the time you worked on

the S. S. "Mary Austin," did you lay off for several days at a time at various intervals and tell Robert Kirchoff that it was because of trouble you were having with your knee?

A. I never spoke a dozen words with Robert Kirchoff in my life. That is a falsehood.

Q. Well, immediately prior to your going to work on the S. S. "Mary Austin" did you meet Mr. Kirchoff at the Horn & Hardart restaurant at Second and Market Street here in Philadelphia and tell him that you were not working because your knee was bothering you and you couldn't work?

[fol. 13] A. I told him no such thing. I asked Mr. Kirchoff why I was not working that day, and he said that they had more men that was ahead of me, that I wasn't entitled to work for that overtime—when we ate breakfast down at the restaurant—

Q. Well, after you had breakfast with Mr. Kirchoff down at the restaurant—

A. That is the only time I ever talked to Mr. Kirchoff was in that restaurant at that time at breakfast.

Q. After you had breakfast with Mr. Kirchoff down at the restaurant—

A. I didn't have breakfast with him. I was eating alongside of him. Mr. Kirchoff was practically a perfect stranger to me, only being superintendent on the job. I never came in contact with him.

Q. But immediately after that you reported to Pier 9 and were employed aboard the S. S. "Mary Austin"?

A. When I went back to work, yes, I went on the "Mary Austin."

Q. You testified that shortly after you went to work on the S. S. "Mary Austin" you were working on top of the boilers?

A. I was overhauling the pops. I took the pops off. They weigh 300 pounds apiece. I handled them myself with a helper.

Q. Did you have to take off any blow-off valves on top of the boiler?

A. I did.

Q. Did you have to chisel one of them off?

A. Yes, sir.

Q. Was Mr. Kirchoff with you when you chiseled this valve off?

A. Mr. Kirchoff—I told you I never came in contact with Mr. Kirchoff.

Q. Your testimony is that Mr. Kirchoff was not with you?

A. Mr. Kirchoff was not with me.

[fol. 14] Q. Would you further state that while you were chiseling this valve off you did not tell Mr. Kirchoff that your knee was killing you?

A. I never discussed my leg or personal being with him at all, at no time.

Q. Mr. West, are you acquainted with a man by the name of Frank Turk Jaworski?

A. No.

Q. You were not acquainted with Frank Turk Jaworski?

A. There were several of the boys down there I never came in contact with because I was by myself pretty near all the time. I didn't work with that gang.

Q. Did you tell Mr. Jaworski that you were suffering from water on the knee resulting from an accident several years ago?

A. I never saw the man before in my life to talk to, only to pay him dues.

Q. You never saw Mr. Jaworski? Isn't it a fact that Mr. Jaworski is the man that hired you at Atlantic Port?

A. Mr. who?

Q. Mr. Jaworski.

A. No, sir. Mr. Winters, the little machine shop foreman under him at the time, the machinist, was the man that hired me.

Q. Mr. Winters hired you and not Mr. Jaworski?

A. No, sir.

Q. Are you familiar with a gentleman by the name of Richard Rozwene?

A. No, sir.

Q. He was a foreman for Atlantic Port Contractors.

A. What's his name?

Q. Rozwene.

A. No, sir. I knew him, yes, I knew him.

Q. You knew him?

A. That was when we went on the "Austin." I was only under him for a little while, because I worked under the other foreman all the time.

[fol. 15] Q. Before the alleged accident of November 21, 1951, did you tell Mr. Rozwene that your knee was in bad shape and was killing you?

A. I never discussed my knee with any of the Atlantic Port personnel.

Q. Are you acquainted with a Mr. A. J. Loughney, who is business agent for the International Brotherhood of Boilermakers?

A. The only contact I ever had with that man, I had to have a form to pay dues, to go to work on that job. I have never spoken a dozen words to him in my life, only to pay him dues.

Q. At the time you contacted Mr. Loughney did you make any statement with respect to your bad knee?

A. Not a bit, not at all.

Q. At the time you gave this testimony in the Fidelity Building, did you describe Mr. Loughney as a blackguard?

A. What? Well, he is a blackguard.

Q. Well, you described him as a blackguard. Did you and Mr. Loughney have a conversation with respect to your knee injury in February, 1953?

A. The only time I went up to make a protest with this man, that while I was in treatment for over a year, that he fraudulently took five dollars and something dues from me when he should have only took $1.60, and he wouldn't refund it. That was the controversy between me and him. That was all.

Q. In February of 1953?

A. Yes. Then we walked down to the dock with one of the other Atlantic Port stooges, to say that the FBI or something was after me to try and scare me out of town.

Q. Who told you the FBI was trying to scare you out of town?

A. This bird right here, this man Loughney.

Q. Did Mr. Loughney tell you that as a result of his knowledge prior to November 21, 1951, your claim was a fraud? Did he say that to you?

[fol. 16] A. Did he say what?

Q. That your claim for an injured knee was a fraud?

A. Yes, he said it was a fraud, but I have the receipts to show that I paid him while I was under the treatment of Dr. Orr. For over a year he took out those fraudulent payments.

Q. Well, now, Mr. West, Mr. Kirchoff, Mr. Jaworski, and Mr. Rozwene will be presented and will testify on this trial that before the alleged accident of November 21, 1951, they had observed or you had told them that you were having trouble with your left knee.

A. That's a rank fabrication, a lie from all three of them.

* * * * * * *

By Mr. Davis:

Q. Isn't it also a fact that after the alleged accident you told various people that you were injured because men working above you dropped a plug on you?

A. I never made any such assertion. The way that assertion was, when I got up there, and the pipe fitters were standing around, I says, "What are you fellows trying to do, kill me?"

I had this plug in my hand. They says, "Mr. West, we haven't been near the job."

Of course, I didn't know what hit me. I didn't know how serious the injury was. I might have made that remark. I asked those fellows to their face why they would drop things on me. They denied that they were up there.

Q. Immediately following the alleged accident was Joseph Learmouth with you, prior to the time you left the engine room?

A. Was who?

Q. Joseph Learmouth.

A. I can't recall this man.

[fol. 17] Q. You didn't yell up and point up to the pipe fitters above and say, "If you had dropped that a few inches further over you would have hit me in the head"?

A. I made no such assertion. I asked them, when they were all together assembled, when Mr. Winters was standing there, what they were trying to do, whether they were trying to kill me or not. I was excited because my leg hurt and I couldn't walk and I was laying on the grating. I

asked them and they told me that none of them were working there, and Mr. Winters says none of his men were working there.

Q. You were lying on the grating, you say?

A. I was lying on the grating at the grating at that time.

Q. Were you unconscious?

A. No, but I was in kind of a coma.

Q. Were you carried out of the engine room?

A. What?

Q. Were you carried or did you walk out of the engine room?

A. No, they helped me up. Mr. Skelton's men, three or four of them, helped me. I couldn't drag that leg up to get up there.

Q. Well, have you ever testified that you were carried out unconscious?

A. I said practically that I was under a coma. By using that word "unconscious," I didn't know where I was. I was in more of a coma than anything. I wouldn't say exactly unconscious.

Q. Mr. West, do you have the plug?

A. I had the plug, but I don't know where it is now. I had it in my hand. They all saw it when I came out of there. It is misplaced somewhere.

Q. Did you have it in February, 1954? Did you have the plug in February, 1954?

A. Maybe I have it somewhere yet, if I could find it, but I had a lot of tools, and I put that plug away specially.

Q. Did you report this accident to anyone on the vessel?

A. Did I report it?

[fol. 18] Q. Yes.

A. When they took me up I reported it to Mr. Winters.

Q. You reported it to Mr. Winters?

A. Yes, sir.

Q. Are you acquainted with Robert Herdelin?

A. I can't place him.

Q. Payroll clerk for Atlantic Port Contractors.

A. I have met him, I think, in the office one time when I went down to get a check.

Q. Did you ever meet Mr. Herdelin and fill out an accident report?

A. Yes, sir, I went to his desk, I think.

Q. Did you furnish him the information that went on that accident report?

A. Well, that's vague. I can't remember just what was in it. Dr. Orr was still treating me at the time, because he was the man that I had to get a paper or something from him to take up to the insurance company.

Q. Let me see if this refreshes your recollection. Did you tell Mr. Herdelin that you were working on the engine on a low-pressure cylinder and that a pipe-fitter dropped a 1-inch pipe plug about 30 feet and hit you on the kneecap?

A. No, I remember telling him no such thing as that.

Q. Did you tell a timekeeper by the name of Mr. J. T. Madden that you had water on the knee before the accident? He is a timekeeper for Atlantic Port Contractors, Inc., and at the time you talked to Mr. Madden he was in the presence of a Fred Hulsworth, another Atlantic Port Contractors employee.

A. No, I never made any such assertion as that at any time.

Q. Mr. West, you were not given a physical examination by Atlantic Port Contractors before going to work for that company, were you?

A. No, I wasn't, I don't think.

Q. You have lost the plug, but what size plug—

[fol. 19] A. Well, I would say it was about—I think it was about an inch and a half. It might have been a little bit smaller.

Q. An inch and a half in diameter?

A. Yes.

Q. How long was it, Mr. West? How long was the plug?

A. Well, I should judge the plug was about, from the top to the bottom of the thread, about two inches, two inches and a quarter (indicating).

Q. Tell the reporter.

A. That is the top of it (indicating).

Q. Tell him how many inches.

A. I say about two inches and a half, maybe more than that. The top would be an inch, the nut would be about an inch and a half. Yes, pretty near two inches and a half.

Q. On direct examination you said you went from the job to a doctor's office. Was this Dr. Farmakis?

A. That's right.

Q. Did Dr. Farmakis take any x-rays of your knees?

A. I think Dr. Farmakis took the blood out of my knee, and whether he took an x-ray at that time I don't know, but I know it was a half dozen x-rays taken on my knee.

Q. Did Mr. Farmakis take an x-ray of your knee, do you know?

A. I can't recall whether he did or not.

Q. You mentioned a Dr. Orr. Is that Dr. Theodore Orr?

A. That's right.

Q. And he also treated you?

A. Yes, sir.

Q. Did you tell Dr. Theodore Orr that a pipe fitter above you dropped a 1-inch pipe plug and that fell approximately 30 feet and hit you on the left kneecap?

A. No, sir, I made an assertion to Dr. Orr that the plug came down from up the top.

Q. You didn't tell him that a pipe fitter dropped it?

A. No, that was from a place down below, when we told him about the pipe fitter, but I thought at that time that the pipe fitters did drop it, but the pipe fitters denied being near the job.

[fol. 20] Q. When did Dr. Orr discontinue treating you?

A. Well, Dr. Orr began treating me a couple of weeks after Dr. Farmakis—Dr. Farmakis told me one day, he said, "Dr. Orr, the Travelers Insurance Company, is going to take care of you from now on," and for the next five or six months they took care of me, Dr. Orr personally.

Q. When did Dr. Orr personally discontinue treatment of you?

A. Well, two weeks after Dr. Farmakis—you can figure the time—that was around Thanksgiving, I mean the 21st of November. Pretty near the first of the month I was up to Dr. Orr, and from then on till the following June.

Q. Till the following June. That would be June of 1952; is that right?

A. That's right.

Q. Did Dr. Orr tell you in July of 1952 that you were fit for duty?

A. No, sir. Dr. Orr told me to go down to the commissioner, that he could do no more for me.

Q. What did he say about your left leg? What did Dr. Orr say about the condition of your left leg?

A. He said he couldn't do nothing for my knee. He had several x-rays. Then that final day he called me back and said: "I will send you over for another x-ray."

Q. Did he say that your leg might have to be removed?

A. No.

Q. He didn't say that?

A. No.

Q. You never testified to that effect?

A. No, nothing like that, the leg would have to be removed.

Q. Incidentally, you testified that Dr. Farmakis removed some fluid from your knee?

A. He did.

Q. How much did he remove?

A. I couldn't tell you.

[fol. 21] Q. Have you ever testified as to how much he removed?

A. No, sir.

Q. You have never testified as to the amount he removed?

A. I might have testified that he took quite a lot of blood, but how much I don't know, because I was laying on the table. I couldn't tell how much blood he took.

Q. If I remember correctly, a minute ago you testified that you also injured your stomach in this accident.

A. Yes, I was hurt across the stomach.

Q. Did you ever tell Dr. Orr or Dr. Farmakis about this injury across the stomach?

A. No, I don't think I ever recalled that, because it seemed minor, but still it hurt.

Q. When did you go to work for Todd Shipyard in Brooklyn?

A. I couldn't recall just exactly. I know I was up there and they wanted an inspector and I went in there for a little while.

Q. Were you given a physical examination when you went to work for them?

A. I was given an examination, and the doctor turned me down, but I got a special permit to go to work.

Q. You were examined by a doctor at Todd Shipyard?

A. Yes, sir, but he wouldn't let me go to work until I went over to the general manager and he O.K.'d it. He said it was all right if I was just going to do inspection work.

Q. Did you make any mention of your knee condition to the doctor that examined you at Todd Shipyard?

A. No, sir, I didn't tell him anything.

Q. Incidentally, Mr. West, after you went to work for Todd Shipyard you suffered another injury, didn't you?

A. The only injury I suffered was when this leg slipped out on me one night and I slipped down in the water and I caught pneumonia.

Q. You fell from a scaffold, didn't you?

A. No, sir, I slipped. I think I was inspecting the turbine, if my memory serves me right, and my leg froze, and I slipped in the water, and I tried to get a little compensa [fol. 22] tion and they wouldn't give it to me because I had signed this paper with Todd Shipyard. They wouldn't even pay my hospital bill.

Q. You filed a claim for compensation, didn't you?

A. I tried to get it but they wouldn't give it to me.

Q. You filed one, didn't you?

A. I filed for it but they wouldn't give it to me.

Q. Do you remember what you stated in your claim for compensation as to what caused your injury?

A. I don't remember now.

Q. Did you state it was

A. I am telling you the truth now, what I am testifying now. That is what happened. I slipped. My leg locked. Not that former testimony, with three lawyers there. I don't know just what I put down there.

Q. All right, let us go back to what you stated on this claim that you filed for compensation. Did you state on that claim that the accident resulted from a defective scaffold?

A. No, sir.

Q. You did not?

A. I made nothing to that effect.

Q. In July 1953, when you applied for a job with Guilbert

Company in Philadelphia you said that you had no physical defects; is that right?

A. That's right.

Q. Did you lose any time during your work for Guilbert Company?

A. Did I do any what?

Q. Did you lose any time for sickness or illness while working from July to November, 1953?

A. No, sir, not one day.

Q. In 1953 — now we are back to the alleged accident with respect to the S. S. "Mary Austin" — in 1953 did you receive a letter from the Bureau of Employees' Compensation telling you that if you claimed any permanent disability to report for another examination?

[fol. 23] A. No, I never received that letter.

Q. You never received that letter?

A. I was out of town at that time, out in California.

Q. What attorney represented you in your claim for compensation for the accident which occurred during your employment with Todd Shipyard?

A. I couldn't recall. It was some fellow came down when I got to the hospital. I tried to get the company to pay the bill, and he said, "We will try to get compensation for you," but this order that I had signed with the company, whatever it was, anyway, I couldn't get compensation. They wouldn't give me any, and he says, "We will take it up again with the commissioner," but I never went back to see the commissioner.

Q. Mr. West, have you requested your attorney to hold that claim in abeyance? Isn't it still pending?

A. To do what?

Q. With respect to your compensation claim for your injury allegedly sustained while working at Todd Shipyard, have you instructed your attorney to hold that claim in abeyance?

A. No. The only thing we asked for was for compensation, that was all.

Q. The compensation claim is what I am talking about

A. Yes.

Q. Did you instruct him to hold it in abeyance?

A. No, sir.

Q. Isn't it still pending?

A. I don't think it is pending, because I have never heard anything from them. I have written them a letter and never heard from them.

Q. When you were working for Todd and you fell from this scaffold—

A. I didn't fall from any scaffold.

Q. Were you working on the "Hibbings Victory"?

A. No, I can't recall the boat. At that time I was inspector of machinery, and it was a lot of water, and I slipped. My leg—

[fol. 24] Q. All right, let me ask you this way: On January 28, 1953, did you sign a U. S. 203, that is a compensation form, stating that on November 20, 1952, while working aboard the "Hibbings Victory" in Brooklyn, you slipped and fell 10 feet because of a defective scaffold and that you hurt your back and side in this fall?

A. No, I told them that I slipped.

Q. Did you sign that form?

A. I slipped off of this board in this water. Now, what the lawyers put down on there I don't know, what they asked for the compensation, but we didn't get it, because I signed an order that I wasn't eligible for it.

Q. Incidentally, Mr. West, you don't remember what you said on this compensation form?

A. No, I can't recall that. The lawyer made that out. I didn't make it out.

* * * * * * * * *

By Mr. Edwards:

Q. Mr. West, do you remember me?

A. Yes, sir.

Q. You saw me on December 22, 1954, did you not, in my offices?

A. Yes.

Q. And you testified under oath before a court reporter?

A. I done what?

Q. You testified under oath before a court reporter; is that correct?

A. Yes.

Q. You were sworn to tell the truth at that time?

A. Well, that testimony—I am telling the truth today. The way you three fellows had me, what I testified, I don't know what I testified, to be frank with you. I had three lawyers there asking me questions. Today I am testifying to the truth.

Q. Were you not represented at that deposition by an attorney, a former associate of Mr. Weiner, Mr. Lakatos?

[fol. 25] A. Mr. Weiner was not there.

Q. I say, were you not represented by an associate of Mr. Weiner, Mr. Lakatos, Mr. Charles Lakatos? Was he not there as your lawyer?

A. One lawyer was there.

Q. Didn't Mr. Lakatos bring you there?

A. Yes, Mr. Lakatos was there.

Q. From the same firm that Mr. Weiner belongs to?

A. Yes.

Q. He was there representing you?

A. Yes.

Q. Do you remember me asking you—this is at page 28—"That is the only work you have done since the accident?" and I was referring to your employment with Guilbert, Incorporated.

A. I don't remember that.

Q. And your answer was yes, that that was the only work?

A. That might have been, but that was wrong; that was wrong.

Q. And you also said later on, at the bottom of page 28 and the top of page 29, "No, I will take that back. It has been two or three times there has been little odd jobs around, and I go down and go over refrigeration and maybe work two or three hours, but nothing to speak of."

A. Well, when I was referring to that, that was the Robbins job. It didn't last long, because out of the time that I was there, and inspecting job would just maybe take two or three hours for each week, but I got paid for that work anyway. It was a miscellaneous small job.

Q. But you made $850?

A. Why, certainly. Sometimes I make that in one week.

Q. Then you said at page 29:

"Q. What would you say you made out of the total of those? Could you give us a total of all of them?

"A. I never made $50. out of that.

"Q. Out of all you did?

"A. Yes. That is the reason I kept no account of that. [fol. 26] When you work two hours, they don't give you any money." Did you say those things?

A. I don't remember those things. They are very vague.

Q. Are you denying that you said what I have just read to you here, that you never made $50 out of any of these other little jobs?

A. That I never made over $50 on making one little job, but not out of all of them.

Q. You told us here this morning on direct examination by Mr. Weiner that in 1953 you worked in Brooklyn on an inspecting job and you made $850 in two months.

A. Made what?

Q. I have it down that you said that you made $850 in two months.

A. Not in two months.

Q. How long was it?

A. Well, that job spread from August all the way to November.

Q. Of 1953?

A. Yes. That is how long it spread over. That was just at short intervals. I wasn't working that full time.

Q. In your direct testimony you said that you had worked for Standard Oil Company and Stone and Webster and American Smelting and Refining Company?

A. Yes.

Q. When?

A. I worked for them off and on for years. I have no data for all that. I can't go back 40 years.

* * * * * * *

Q. When you were hired by Atlantic Port Contractors what was your job classification as you understood it?

A. The foreman hired me, the machine shop foreman hired me, to give him a hand on the pops and on the engines.

Q. What was your job classification as you understood it, Mr. West?

A. Well, a mechanic.

* * * * * * *

[fol. 27] Q. Do you recall Mr. Davis asking your about this job over in Todd Shipyard?

A. What Mr. Davis?

Q. That is Mr. Davis who was just questioning you a minute ago.

A. Yes.

Q. You were asked that at a deposition in my office. I am referring to page 46.

> "Q. Did you have a little accident?
>
> "A. Well, not as to speak of. I was on a job, and I know I was done on that job, it was bad, and I slipped off a scaffold and fell into the water and I wasn't on the job long enough to do anything, and then I went up to the hospital."

Do you remember saying that?

A. I said that's bad for me, because I told you before, with the testimony there, I am giving you the straight truth today. About the job at Todd, it is when I was inspecting that, when I got down off of that, I slipped in the water, and I went to the Cumberland Hospital. I had pneumonia. That is when this lawyer come over to see me about compensation, and in between that and the pneumonia and one thing and another, the commissioner, we went to the commissioner's office, and he says, "Well, we will set this for a later date," but I went to California. I lost my wife and I never bothered with the case any more because I figured the best I could have got was a few weeks' compensation, but I did want them to pay the hospital bill, but they wouldn't pay it, because they showed me I signed a statement that I was unfit for work when I went to work there, and I would never have got that job if I hadn't had pull to get in there.

Q. What kind of work was this that you were doing there?

A. I will tell you. I have had a specialty of a great many years of constructing boilers, and I generally hang around [fol. 28] them a lot, because I put in a lot for the powerhouses for the Standard Oil and other different people.

Q. Is that what you were doing there?

A. There I was inspecting boilers.

Q. You were inspecting boilers?

A. Inspecting boilers and doing a little other odd work, one thing and another, giving the superintendent a hand.

Q. You were asked at the deposition what kind of work you were doing over there. I am referring to page 47. You were asked:

"Q. What type of work was it? What were you doing?

"A. The work I was doing, I was fabricating steel."

A. Well, I might have been doing that.

Q. Well, now, which is correct, Mr. West?

A. Well, I told you I was doing several things.

Q. I thought you told me you were inspecting?

A. When you are putting boilers together, you are fabricating. When you are repairing, you are repairing. I can't remember just what little things and every item I done on that job.

Q. You were asked:

"Q. What is that?

"A. Fabricating steel?

"Q. Yes.

"A. That is putting certain sections in, and shapes like bulkheads."

A. Well, you know, at Robbins at that time, when I was on this job, I would go over on this other job when something wasn't ready, when I wasn't doing the inspecting job or something. They don't keep you around idle. If a man can do things they put him on them.

Q. Do you remember at the deposition testifying, page 10, as to how much blood Dr. Farmakis took out of your knee?

[fol. 29] A. I remember. I might have made a remark that he took out quite a lot of blood, but I don't remember just how much it was, but I know my knee was pretty near three times the normal size, and they were several minutes taking that blood out, and the knee went way down to pretty near normal, but then it would come back again, and when I went up for treatment again, I can't remember

whether he took out more blood, but I know that he kept working on that knee and giving me heat treatments.

Q. Did you ever say that Dr. Farmakis took a quart of blood at any time?

A. A quart?

Q. Yes.

A. No.

Q. You never said that?

A. No, I don't know what I said, but what I am telling you, I don't know just how much, whether he took one drop or took a gallon out, I don't know. How would I know, laying prone on an operating table?

Q. As I understood your testimony on direct examination, you said that you were down on one knee inside this low-pressure cylinder?

A. Yes.

Q. And your right knee was down, was it?

A. My right knee was down like this, and my left knee was up.

Q. And what was your right knee down on?

A. My right knee was down on a little piece of sack or something, a piece of paper.

Q. What was the paper on?

A. That was on the bottom of the cylinder.

Q. Was the piston in or out of the cylinder?

A. It was out.

Q. The piston was out?

A. Yes. Everything was stripped out of there, and we had just put everything back again, and she was all the fol. 30 way down, so that gave you a perfect flat surface at the bottom of the cylinder.

Q. Your right knee was down and your left knee was up?

A. Yes.

Q. And your left foot was flat on the bottom of the cylinder, was it, your shoe?

A. What?

Q. Was your left foot, the shoe, flat on the bottom of the cylinder?

A. I was in a kneeling position on one knee and one knee sticking up, so it must have been that. It couldn't have been suspended in the air.

Q. Where on the left knee were you hit?

A. I was hit right on the center of it.

Q. Center of what?

A. Of the knee, of the kneecap.

Q. Right in the center of the kneecap?

A. I would judge that, yes. I couldn't swear. It might have been on the side or it might have been a little bit above it.

Q. Now, you say you don't have the plug today?

A. I can't place where the plug is. Four years is a long time to take care of anything.

Q. You said your had it in a tool box that you had at the time of the deposition?

A. I did have, yes. I kept it for a long time.

Q. What did you do with it?

A. I don't know where it is. It is gone.

* * * * * * *

Q. Now, you said in your prior testimony that you thought that the pipe fitters did drop the plug.

A. I will tell you how that is. Let's get that clear.

Q. You did say that?

A. I said that when I went up on deck I says to the pipe fitters, "What did you throw down on me? What are you [fol. 31] trying to do, kill me?" and they says, "We t, we haven't been here. We haven't worked on this job. We haven't been on this job."

I was just under the impression that somebody had threw it down or dropped it down, but it was no one there, and when the water came out, I put two and two together. I figured this plug had to come out of this pipe line or had to come out of one of these tanks.

Q. When did you start to put two and two together?

A. I put two and two together right away.

Q. Right away?

A. When you are hurt pretty bad and you come up out of a place you are all mixed up. You holler at anybody. You want to know what happened to you. If I dropped something on you, you would want to know what happened to you, wouldn't you?

* * * * * * *

By Mr. Davis:

Q. Now, Mr. West, since you have now put two and two together, who did drop the plug on you?

A. Who did drop the plug on me? God knows who dropped it. Nobody dropped it. It blew out or something, because there was no one up there. When I looked up, all that was coming down was water. There was nobody in sight.

Q. All right, you said that you put two and two together and figured that that plug must have come out of that line. What line?

A. I couldn't tell you. It was a water line up there, and it was tanks up there. It might have come out of the tanks. It might have come out of this pipe line or its appurtenances. I don't know because I couldn't see.

Q. What tanks?

. . . . . .

Q. All right, that is what I am asking you. You say these tanks are right by the door?

[fol. 32] A. I won't swear where they were. Every one of them has different ones. We went down on four Liberty boats the other day. On every one of them they were in a different position, the pipe lines were in a different position. They were built by 40 different companies in the United States during the war, and none of them are exactly the same.

Q. Are they directly over the low-pressure cylinder?

A. No, no.

Q. Where are they?

A. The low pressure cylinder sets back there, and they are over that way a little bit.

Q. Forward or aft?

A. They are ahead of it.

. . . . . .

Q. Are they forward or aft of the low-pressure cylinder?

A. The low pressure cylinder sticks right like this. Well, they are right over there. Just as you come in the door, over here some place. I can't remember whether they are on this side or on that side. I don't know whether the plug

came out of this tank. I don't know whether the plug came out of these appurtenances to the water line, but I know it came down. Where it came from God only knows. I don't know.

Q. When you entered the access door, you have stated that you don't know whether the tanks are on the left or the right of the access door; is that your testimony?

A. I don't know where they were, to tell you the truth. In other words, I don't know whether the plug came out of the tank, I don't know whether the plug came out of the pipe line, but I know the plug came down. That is all I know. I am not familiar with everything up there. I never worked up there. I was in the engine room all the time.

Q. And this is right above the engine room, isn't it?

A. Yes, sir. You have a flight of stairs that goes up, a step that goes up, then you have a grading up here, then they have up above that, I would say, about five or six feet, they have pipe lines run across, then those tanks are there, [fol. 33] but where they are, I can't figure in my mind just where they were, because it is vague. It has been a long time ago since this happened.

Q. But you have stated that they are right by the access door when you enter, and you don't know whether they were on the left—

A. They can't be over in front of the door. They got to be over from the door.

Q. Either to the left or right; is that correct?

A. They are either on the right or left or they are some place up there, because I have seen them. One of them has them in the back and one of them has them pretty near over on the side here.

. . . . . .

Q. Did this plug fall directly into the cylinder?

A. Well, now, I couldn't say, when this plug fell down, because the only thing I remember, when it hit me on the knee, was seeing the plug hit over on the side. I picked the plug up. I could hear this rattling, because I heard a big noise. That fell quite a way. It must be 30 feet. I wouldn't say how high it is, but I think it must be close to 30 feet.

Q. You think it is about 30 feet?

A. I think so. I wouldn't swear to that, but it is quite a little distance.

Q. On page 9 of the deposition the question was asked:

"Q. I believe you said some water came down on you.

"A. There was a plug came down and bounced on the cylinder or on the engine casing, and that bounced over and hit my knee, and that knocked me down, and there must have been, I don't know how much water came down, and I jumped, and the fellows came down and got me and pulled me up. I know I was submerged in water, and of course that water, a lot of it ran out of the cylinder."

[fol. 34] A. I wasn't submerged all the way in it. There was just a certain amount of water ran on me.

Q. "See, a lot of it ran out but a lot of it didn't run out. They took me out and carried me up to the dock, and my knee was in pretty bad shape, it was swollen, so I went up to Doctor Farmakus and he took at least, I should say, a quart of blood out of it, bruised blood."

A. I don't know how much, but I know my knee was three times the normal, and this fellow was pretty near an hour getting the blood out of my knee. I imagine, the way it was, that he took an awful lot. Now, how much he took, if he took one drop or took a half a gallon, I wouldn't know. I never even asked him. In fact, I was in no position or didn't feel like asking him. I wanted to get home. I wanted to go to the hospital.

Q. All right, let us get to the next question. This is a question asked by Mr. Edwards:

"Q. This plug came down and hit somewhere on the engine?"

A. It hit on my knee, that is where it hit, then it hit the engine.

Q.

"A. Yes, it hit somewhere on the engine. I never know exactly where it hit but after they pulled me out of there, I grabbed this plug and I put it in my pocket."

A. Now, that is all wrong. I had that plug in my hand when I started out.

Q. Let me finish, please.

"I wanted to see where it came from. I asked several of our men and they said they knew nothing about it. None of the Atlantic Port men were working on that job. So I still have the plug."

A. I did have the plug, but I can't place it. I don't know where it is.

Q. You don't know where the plug came from; is that your testimony?

[fol. 35] A. I know that the plug, to the best of my ability, and I know ships pretty good, I have helped design them—I know it came out of a water line or came out of a tank, but which one it came from or the appurtenances, I do not know, because it couldn't tell, 25 feet or 30 feet below, where it came from.

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By Mr. Weiner:

Q. Dr. Myers, did you at my request examine Mr. Edgar West on July 23, 1952?

A. Yes, I did.

Q. Will you tell us what you found upon that examination? Did you take a history from him at that time?

A. Yes, I took a history of an injury to his knee when a plug struck it.

Q. Did you examine his knee at that time?

A. Yes.

* * * * * * *

A. I then referred him for x-ray, which was negative for fracture.

Q. Did you make a diagnosis at that time, Doctor?

A. I then made a diagnosis of traumatic chondromalacia of the patella.

Q. In your opinion, was Mr. West at that time or was he not disabled from doing anything but sedentary work?

A. Yes, he was disabled except for sedentary work.

* * * * * *

Q. Doctor, do you have an opinion as to whether up to this date, that is, the date of your last examination, December, 1955, Mr. West was able to perform anything but sedentary work?

A. No, he was unfit for anything except sitting.

[fol. 36] By Mr. Edwards:

Q. Dr. Myers, did your examinations on each day that you made them of Mr. West take into account any pre-existing condition in this left knee?

A. Only by history that the man had no difficulty before he was injured and was performing his duties without complaint.

Q. And your diagnosis is based on such a history?

A. Yes.

Q. You did mention I believe in direct examination that x-rays were taken, I believe at your request, shortly after your examination of July 23, 1952?

A. And also in December of 1955.

Q. The x-rays of July, 1952, were taken when?

A. July 24, 1952.

Q. By Dr. Isard?

A. Dr. Isard, yes.

Q. In your direct examination I believe you stated that the x-rays showed that there was no evidence of fracture.

A. That's right, right.

Q. What else did they show, Doctor?

A. They showed a narrowing of the knee joint space.

Q. Doesn't the report read, "There is a suggestion that the joint space is slightly narrowed"?

A. Yes.

* * * * * * *

Q. What about the special views of the patella?

A. No abnormality is noted.

Q. There was no soft tissue calcification?

A. That's right.

Q. How does that reconcile with your diagnosis of chondromalacia?

A. Because chondromalacia means softening of the

[fol. 37] cartilage, and the cartilage doesn't show on the x-ray anyway. You can't make this diagnosis by x-ray.

* * * * * * *

Q. Doctor, one more question: The mention in the x-ray report of July 24, 1952, about the suggestion that the joint space is slightly narrowed, is that commensurate with the given age of Mr. West?

A. Yes, I think so. That does not always have significance unless the clinical findings substantiate it. Those are things that x-ray men include in their readings, but they don't always have clinical significance.

* * * * * * *

Dr. Theodore E. Orr, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Weiner:

Q. Dr. Orr, you are and were in November of 1951 employed by the Travelers Insurance Company in their clinic; is that right, sir?

A. That is correct.

Q. In that connection did you have occasion to see an Edgar A. West?

A. I did.

Q. What was the first time you saw him, Doctor?

A. December 4, 1951.

Q. And was that in the Travelers Clinic?

A. Yes, sir.

Q. Were you aware at that time that he had previously to your seeing him been under the care of a Dr. Farmakis?

A. Yes, sir.

Q. And he had then been transferred to your care?

A. Yes, sir.

[fol. 38] Q. And the condition for which you saw him on that day and for which he was thereafter treated, so far as your records show, resulted from an accident which Mr. West sustained on November 21, 1951; is that correct?

A. November 21, 1951.

Q. Doctor, will you give us the dates upon which Mr. West was seen by you or at the clinic under your direction.

A. All the dates?

Q. Yes, sir.

A. January 3, 1952; January 10—

Q. Was that the first date, sir?

A. No, the first time was on December 4, 1951.- January 3, 1952; January 10, 1952; February 21, 1952; March 25, 1952; March 28, 1952; April 10, 1952; April 29, 1952; May 13, 1952; June 19, 1952; July 3, 1952; July 9, 1952; July 21, 1952.

Q. On those dates he was seen by you personally; is that correct?

A. Yes, sir.

Q. Now, in addition to those visits upon which you saw him, was he also receiving other treatment at the clinic in the nature of physiotherapy treatment?

A. Yes, sir.

Q. Do you have the dates on which he received such other treatment and the nature of the treatment?

A. I know the nature. I don't have the dates.

Q. Well, would it be fair to say that it would be rather continuously during this period under which he was under your treatment?

A. Yes, three times a week.

Q. And that was continued up until July of 1952?

A. Yes.

Q. Now, you say that you do know the nature of the treatment. Would you advise us of the nature of the treatment, please doctor.

[fol. 39] A. Physical therapy, the application of heat massage, active and passive exercises.

Mr. Weiner: That is all.

You may cross-examine.

Cross examination.

By Mr. Davis:

Q. Dr. Orr, did you prepare and submit reports to Travelers Insurance Company as to your examinations and treatment of Mr. West?

A. Yes, I did.

Q. Do you have a copy of your report of January 2, 1952?

A. I have January 3, 1952.

Q. I was mistaken. January 3, 1952, was the report I was referring to. In your report of January 3, 1952, do you have a statement as to how the accident happened?

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Direct examination.

By Mr. Davis:

Q. In your report of January 2, 1952, do you have a statement as to how the accident occurred?

A. I have no report as to how the accident happened, on January 2, 1952. I examined the man on January 3, 1952. I first saw the patient on December 4, 1951.

Q. Well, do you have a copy of your report of January 3, 1952?

A. Yes, sir.

Q. May I see it?

[fol. 40] A. Yes, sir (handing).

Q. Doctor, would you read what the report states under history.

A. "On engine top working on a low-pressure cylinder. Pipe fitter on top dropped a one-inch pipe plug approximately 30 feet, hitting left knee."

Q. Doctor, did you have any personal knowledge with respect to the accident, as to how the accident occurred?

A. All I have is what I have written here, and when I examine a patient I read the history as it is given and check that with him. If it is incorrect, I so state.

Q. Well, who gave you the information stating the history part of the statement? Who gave you the information stated in the history part of your report of January 2, 1952?

A. The patient.

Q. Doctor, what did you find to be the condition of Mr. West's knee at that time, January 3, 1952?

A. The patient complained of pain from his left knee. He was wearing an elastic bandage, under which was a rubber sponge over the patella or kneecap. There was no frac-

ture. That is, there was no clinical fracture of the patella. He had moderate fluid in the prepatella bursa, that is the patella, in front of the knee joint, commonly known as house-maid's knee. There was pain to pressure over the patella or kneecap. There was no apparent involvement of the knee joint proper, and physical therapy was advised.

Q. Doctor, would you give a layman's explanation of housemaid's knee?

A. Well, in front of the patella there is a bursa, and that sometimes becomes full of fluid, or partially so, known as bursitis, and on my first examination this man had some fluid in that bursa.

Q. Does it require a severe blow to cause housemaid's knee?

[fol. 41] Mr. Weiner: If Your Honor please, I object to the form of that question.

The Court: The objection is well taken, but I am going to overrule it.

A. May I have the question again, please.

By Mr. Davis:

Q. Does it require a severe blow on the knee to cause the condition that you have described as housemaid's knee?

A. A severe blow?

Q. Yes.

A. No, not necessarily.

Q. Could it come about by kneeling?

A. Yes, sir.

Q. Does this condition often develop among people who have to do a considerable amount of kneeling?

A. Yes.

Q. Could you give us an example of some of the people or some of the occupations of people who develop this type of knee?

A. Cement finishers. Any occupation requiring continuous kneeling.

Q. Dr. Orr, did you make a report to Travelers Insurance Company on April 23, 1952?

A. April 23?

Q. Yes, sir.

A. No, I have no copy of it. I have April 10.

Q. Is that the one in which you evaluated certain x-rays?

A. I have x-rays made on March 27, 1952.

Q. You say you made a report on April 10, 1952?

A. April 10 I made a report, and on April 29, 1952, I made a report.

Q. What was the condition you found on April 10, 1952?

A. "Patient states he is feeling much better, is now able to walk with much less pain. There is no swelling. He [fol. 42] had good function, no pain to palpation, that is, to pressure, and I feel that the patient should be able to return to work before long."

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By Mr. Edwards:

Q. What is your specialty?

A. Orthopedic surgery.

Q. How long have you specialized?

A. Since 1923 or 1924, about that time.

Q. Are you certified as a diplomate?

A. I am.

Q. By whom? By what organization?

A. By the American Board of Orthopedic Surgeons.

Q. You will recall just a few minutes ago being asked questions by Mr. Davis, seated at the other counsel table, and you gave us the results of your first examination of Mr. Edgar A. West?

A. Yes.

Q. What date was that made on?

A. December 4, 1951.

Q. When did you see him after that, Doctor?

A. January 3, 1952.

Q. Now, before I get to the January 3 visit, did you make a provisional diagnosis as a result of your first seeing Mr. West on December 4 of 1951?

A. I did.

Q. And what was that, sir?

A. Contusion of the left knee.

Q. Will you tell us what your findings were on January 3, 1952.

A. "There was no swelling of the knee. He complains of considerable instability in walking and pain on the inner side of his knee. The pain to pressure is over the internal tuberosity of the tibia. Passive knee function is good. Continue treatment."

[fol. 43] Q. When did you next see Mr. West, Doctor?

A. January 10, 1952.

Q. What were the findings then?

A. "Patient states his patella seems to slip. However, there is no abnormal mobility of the patella, no crepitation. Continue treatment and exercise."

Q. What is crepitation, Doctor?

A. Grating.

Q. Sir?

A. A grating, like an old hinge.

Q. When did you next see Mr. West?

A. 2-21-52.

Q. What were the findings then?

A. There was no swelling of the knee. He had normal range of motion, apparently without pain. His chief complaint is instability in walking and when going up and down stairs. I believe it would be a good idea to contact his employer to see whether the patient could have some form of light work to start with. Active floor exercises were increased.

Q. When did you next see him, Doctor?

A. 3-25-52.

Q. What were the findings then?

A. This man's physical status seems to be at a standstill. He makes no complaint at this time of pain to palpation, that is pressure, and he has a normal range of motion passively of his knee. He states he was recently examined and x-rayed while in Baltimore. I will refer the patient for x-ray of his knee, for I feel it is now time for him to return to at least light work.

Q. And he was x-rayed; is that correct, Doctor?

A. Well, I don't know whether he was x-rayed in Baltimore or not, but he was x-rayed on March 27.

Q. And did you review those films, Doctor?

A. Yes.

Q. And when, sir?

[fol. 44] A. March 28, 1952.

Q. What did they show?

A. They were negative for any definite joint disease or misalignment.

Q. You have already told us about the time you next saw him on April 10, 1952. When did you next see him after 4-10-52?

A. 4-29-52.

Q. What were the findings then?

A. "This patient has gone through various types of active exercise. I believe in the last two weeks there is a definite improvement in his ability to do the exercises. He certainly has less pain. Continue as is for the present."

Q. You say there he certainly had lots of pain or less pain?

A. Less pain.

Q. When did you next see him, Doctor?

A. May 13, 1952.

Q. What were the findings there?

A. There was no swelling of his knee. Patient states that pain is gradually subsiding. However, he feels that he is not able to do the type of work he was doing, that is, at the time of the accident.

Q. When did you next see him?

A. June 19, 1952.

Q. What were the findings then?

A. Patient still complains of a great deal of pain of his left knee and feels that treatments are not helping him. I advised him to discontinue treatment for two weeks and report again for checkup examination at the end of that time.

Q. When did you next see him, Doctor?

A. July 3, 1952.

Q. What were the findings then?

A. Patient complains extensively about inability to get about on the right knee. That may be an error.

[fol. 45] Q. I think that is an error.

Mr. Weiner: I think we can agree that that is the left knee.

Mr. Edwards: We will agree that it should be the left knee, Doctor.

The Witness: He states he is going backward instead of forward. He walks with only a slight limp of the left leg. There is no swelling of the left leg. There is moderate atrophy of the quadriceps on the left side. The quadriceps is the muscle above the knee, the front part of the thigh. On active motion there is very little restriction of function. He can fully extend the lower leg and flex beyond a right angle. There is no instability. His chief complaint is weakness and stiffness of the knee, particularly the first thing in the morning and the latter part of the afternoon and on prolonged walking or standing. No further improvement can be expected from physical therapy. Treatments discontinued.

Q. What was your next connection with this man?

A. On July 9, 1952, I reviewed the x-rays made on July 3, 1952, and found them negative. That is, I could find no pathology.

Q. And at that time, Doctor, what was your opinion as to Mr. West's ability to work?

A. It was my opinion he was able to work at that time.

Q. When did you next see Mr. West?

A. July 21, 1952.

Q. What were the findings then?

A. On re-checking the patient, examination reveals no crepitation of the knee joint, no instability of the knee, no subpatellar crepitation, that is a grating, underneath the kneecap. He does have quadriceps muscle atrophy. He has a free, non-painful range of motion from 180 degrees, which is a straight line, to 80 degrees, which is just beyond a right angle. He persists in complaining of stiffness and [fol. 46] pain the first thing in the morning. He has no swelling of the knee. He also complains of weakness of the knee at times. This is probably due to the quadriceps atrophy. Patient has been under physical therapy since 12-51. For the last two months he has shown no improvement, and it is my feeling we have accomplished all that may be expected from physical therapy. I do not advise further treatment.

Q. Doctor, during your course of treatment of Mr. West did you find any indication of chondromalacia?

A. No, I didn't.

Q. At no time?

A. No.

Q. Doctor, do you have an opinion as to whether there is any relationship between the condition of Mr. West's left knee and his age?

A. Well, I don't quite fully understand the question. I know this, that as we get older there are certain joint changes which take place with age.

Q. Well, for example, Doctor, there was discussion here earlier today about an x-ray which was taken on July 24, 1952, by a Dr. Isard, which reported that there was a suggestion that the joint space of this left knee was slightly narrowed.

A. Yes, I recall.

Q. Is that commensurate with the age of Mr. West of 65?

A. Could be, yes, sir.

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By Mr. Weiner:

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Q. I note from your report there, the copy that I have, that your provisional diagnosis the first time that you saw the man was a contusion of the left knee.

A. Yes, sir.

[fol. 47] Q. Have you had any opportunity or did you make any further diagnosis as to what was wrong with Mr. West's left knee?

A. No, I think that covers it.

Q. Well, would you want to state then that in your opinion there was nothing more than a contusion?

A. Well, as a result of the contusion he could have joint pain and did have. He has as a subsequent result this muscle atrophy.

Q. The atrophy of the quadriceps muscle, wouldn't that be something other than a contusion of the knee?

A. Oh, it could be, yes, but with a knee involved that is not functioning properly as normal, he isn't using that muscle as he normally would, and that it called a disuse atrophy.

Q. In other words, it comes about because he doesn't put any weight on that foot, is that correct, or on the knee?

A. He was putting weight on it, but he wasn't using it for some time in a normal fashion. That is a very common finding with knee injuries.

Q. That is, the atrophy of the quadriceps muscle?

A. Yes, sir.

Q. Of course, that is in addition to the contusion of the left knee. I mean the contusion of the left knee as such would not include an atrophy of muscle, would it?

A. It could bring it about.

Q. In other words, the atrophy may be a result of the contusion?

A. Yes.

Q. But your provisional diagnosis of contusion did not include those other findings which you later found; is that correct?

A. That's right.

Q. Let me ask you, Doctor, was there more wrong with this man's knee than a simple contusion, in your opinion?

A. I didn't think so.

[fol. 48] Q. You still don't?

A. I don't.

Q. And with that contusion you treated him for about eight months; is that correct?

A. He was disabled up until the last time I saw him. I told him that I felt he was able to work on July 9, 1952.

Q. On the day that you last saw Mr. West, July 21, 1952, it is true, isn't it, that he was still complaining of stiffness and pain in the knee in the morning, the first thing in the morning?

A. Yes, sir.

Q. On July 21, 1952, you noted that for the past two months before that he had shown no improvement?

A. Yes, sir.

* * * * * * *

By Mr. Weiner:

A. I was foreman cleaner, appointed by the superintendent of Atlantic Port Contractors.

Q. How long had you been working in that capacity aboard the "Mary Austin"?

A. I would say about a couple weeks.

Q. Had you been working on that ship from the time that she came into that pier?

A. From the first day she came in.

Q. Incidentally, what pier was this, sir?

A. Pier 9, Delaware Avenue.

Q. In Philadelphia?

* * * * * * *

Q. What kind of ship is the "Mary Austin"?

A. She is a Liberty ship.

* * * * * *

[fol. 49] Q. Was any of the ship's equipment in operation, that is, the ship's machinery in operation, at the time?

A. Yes, the starboard boiler was going full, burning full.

Q. Was any other of the ship's equipment in operation that you know of?

A. Yes, there were dynamos going. The ship's dynamo was going.

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By Mr. Davis:

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Q. You said the ship's boilers were in operation?

A. One of the boilers. There are two boilers. One was in operation.

Q. Who had put those boilers in operation?

A. Some of the Atlantic Port Contractors' workmen.

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By Mr. Weiner:

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Q. Referring to that sketch, and to your knowledge of Liberty ships, I would like you to give us certain measurements so that they will be placed on the record. Can you tell us how many feet it is in distance from the top of the engine to the bottom of the distiller tank?

A. That distance is nine six plus nine ten plus about two feet.

The Court: 21 feet 4 inches.

[fol. 50] By Mr. Weiner:

Q. Is that correct, sir?

A. That is correct.

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Q. Is the tank forward or aft of the center of this low-pressure cylinder?

A. It is slightly forward.

Q. About how many feet would it be forward from the forward edge of the low-pressure cylinder to the distiller tank?

A. I would say that's about 36 inches.

Q. Now, referring to those plans and diagrams, or from your own knowledge, can you tell us the diameter of the low-pressure cylinder on the main engine of a Liberty ship?

A. 70 inches.

Q. Can you tell us the depth of the low-pressure cylinder when she is stripped?

A. About 4 foot 9 inches, because it has a 4-foot stroke.

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Q. Does that have any kind of a plug, a pipe plug, in any way attached to it, underneath it?

A. Yes, the pipes that lead off from that down to the different tanks may come off with a T, and there is a plug in one leg of the T, and then the pipe takes off on the side.

Q. This that you have just described is on the forward bulkhead as you look into the engine room; is that correct?

A. That's right.

Q. What other tanks or appurtenances are on that bulkhead and connected in any way with that?

A. You have your condenser there where the vapor comes from your evaporator down on the floor plates, which travels up there, and then there is cold salt water passed through tubes that condenses that back to water. Now, on [fol. 51] one side, at the bottom of this condenser, they have a Y connection down there. On one side the water comes in from the sea, passes through the condenser, and back out and goes overboard.

Q. Does that unit, from your experience, have pipe plugs in it?

A. Yes, they do.

Q. What is this third unit on this forward bulkhead?

A. Well, the third unit, sometimes they have over there what is known as a collector tank. That is so that they don't form a vacuum, then pull the condensate through too fast. The water from this condenser flows into there and then it flows by gravity over into this charcoal charged purifier that I have just described to you.

Q. This last tank that you mentioned, would that also have a pipe plug at the bottom of it?

A. Yes, that would have a clean-out plug in it, too.

Q. Mr. Mellon, what lines are there in the overhead of the engine room above the main engine on the normal Liberty ship?

A. Over the main engine?

Q. In the overhead above the main engine.

A. Well, you have your steam line to your afterdeck machinery and you have your return exhaust line from the deck machinery back to your auxiliary condenser or the main condenser, whichever you prefer to use.

Q. And would either or all of those lines contain pipe plugs?

A. They could.

Q. How far above the top of the main engine are these plugs?

A. About 25 feet.

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By Mr. Davis:

Q. Mr. Mellon, from the distiller tank to the low-pressure cylinder you say it is approximately 3 feet?

[fol. 52] A. Somewhere in that neighborhood. I wouldn't want to tie myself down, because I don't have that measurement, but it is right close to it.

Mr. Weiner: You mean forward distance, Mr. Davis, not distance up and down?

Mr. Davis: I mean forward distance.

By Mr. Davis:

Q. Speaking of vertical distance, from the main engine, I am talking about the top of the low-pressure cylinder to

the grating which you spoke of being above, what was your testimony as to that distance?

A. What was the testimony on that one?

Q. You say that is 21 or 22 feet?

A. Well, that is approximately that. From the top of the cylinder?

Q. Yes.

A. That would be nine six, five six, and nine ten. That would be about 19 or 19 foot 6.

Q. Nineteen or nineteen six?

A. That's right.

Q. The distiller tank is attached to the forward bulkhead?

A. It stays on some brackets that are attached to the bulkhead, that's right.

Q. Is there a grating under the distiller tank?

A. No, there is no grating under that. That is just a void space down underneath there. There is a grating that goes up close enough to it so that you work on that, but there is nothing underneath it.

Q. Well, if that were a void space with no grating underneath the distiller tank and the plug came out, where would it fall?

Mr. Weiner: If Your Honor please, I object to that question.

The Court: Overruled.

[fol. 53] By Mr. Davis:

Q. Where would it fall?

A. That could fall in a great many different places. I don't know whether you are familiar with the thread on a plug or not, that we must have a spiral there. Now, if that plug came out and the lower lip of the plug came out from the back of this fitting first—

Q. I can't hear you; I am sorry.

A. I say, the plug is tapered, that is, with the thread running around in a spiral. Now, if the start of this plug should happen to come out of the back of this opening where it is screwed into, then, naturally, it would have a tendency to kick out over towards the low-pressure cylinder. If it went in the other way, then it would probably

kick out the other way, but I don't think it would fall exactly vertical if it came out of there.

Q. It would not fall vertically?

A. I wouldn't say that it wouldn't. I say I don't think it would.

Q. But if it did, there would be no grating there to catch it; is that right?

A. There would be no grating there to catch it.

* * * * * * *

Q. Doctor, when did you first have occasion to see Mr. West, Edgar A. West?

A. November 21, 1951.

Q. Was that at your office, sir?

A. That was at the office.

Q. Do you have a record of the time of day when you first saw him?

A. No, sir.

Q. Did you take a history from him as to what had occurred?

A. This is the history, "A pipe plug fell 15 feet, struck [fol. 54] the floor, and then bounced back and struck the left knee."

Q. Doctor, did you treat Mr. West on that date?

A. Yes, sir.

Q. What did you do for him?

A. Why, we x-rayed him and we tapped the bursa in front of the kneecap.

Q. What do you mean by tapping the bursa?

A. You insert a needle and remove fluid.

Q. Was there fluid in the knee which you removed surgically?

A. Yes, sir.

Q. How much fluid did you remove?

A. 20 cc.

Q. And did you then wrap the knee or do anything else for him?

A. We applied a rubber sponge and a compression bandage.

Q. Give me the dates when you next saw Mr. West at your office.

A. November 23, 26, 27, 28, 30, and December 3.

Q. What was the disposition made of his case on December 3, 1951?

A. He was referred to Dr. Orr, the Travelers Insurance Company Clinic.

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By Mr. Edward:

Q. Dr. Farmakis, what was your diagnosis?

A. The diagnosis was an acute traumatic prepatellar bursitis.

Q. Doctor, is that diagnosis or that condition comparable to what is known as housemaid's knee?

A. Well, housemaid's knee is more of a chronic type of this condition from kneeling on your knees all the time. This is an acute traumatic condition. Housemaid's knee [fol. 55] is similar, but the duration, the cause, is usually over a long period of time from kneeling.

* * * * * * *

Q. Can you tell us where the injury was, specifically?

A. The injury was in front of the kneecap. There is a sac there called the bursa, and that sac was swollen, so that was what we called a pre, which means in front of, and patellar means the kneecap. It was a prepatellar bursitis.

* * * * * * *

A. The kneecap, in front of the kneecap.

Q. The whole front?

A. Yes, the bursa.

Q. Was the skin broken or were there any cuts?

A. I have no recollection of a break in the skin, no, sir. I don't have any record in the book that the skin was broken. It was just swollen and the sac was distended.

* * * * * * *

By the Court:

Q. Would you translate 20 cc. into ounces or fractions of liquid ounces?

A. 30 cc. make an ounce.

Q. So it was two-thirds of an ounce?

A. Two-thirds of an ounce. Two or three teaspoonfuls. A teaspoon has 4 cc.

Q. A teaspoon has 4 cc.?

A. Well, some say 5.

The Court: So it is three or four teaspoons.

A. Two-thirds of an ounce.

[fol. 56] Q. Then the diameter of the plug would be either an inch and a quarter or an inch and a half?

A. Correct.

Q. How long are they?

A. There is a nut to remove them. It is about three-quarters of an inch deep, and the body of the plug itself is between seven-eighths and one inch thick, so we could say about one and three-quarter inches overall.

Q. It has been testified that they are made of cast iron?

A. That's right, cast iron or malleable iron.

Q. That is still cheaper, isn't it?

A. No, it is softer material.

Q. What would that weigh, a few ounces?

A. Yes. That would be about two cubic inches. That would run four or five ounces.

Q. In other words, in the neighborhood of a quarter pound?

A. That's right.

* * * * * * *

Q. I think both Mr. Weiner and Mr. Davis have asked you about this distiller tank.

A. That's right.

Q. And I believe you gave a measurement of 36 inches.

A. In height.

Q. No, in displacement.

A. In height.

Q. I thought it was 24 feet 4 inches vertically?

A. No. That is from the bottom of that tank down to the top of these cylinders.

Q. What is the 36 inches?

A. The 36 inches is the distance from that tank over to the edge of the low-pressure cylinder.

Q. Is that to the edge of the cylinder or the center of the cylinder?

[fol. 57] A. No, about the edge of the cylinder.

Q. About the edge?

A. About the edge.

Q. How accurate is that measurement of 36 inches?

A. I don't want to be too accurate. I would say that was within three or four inches one way of the other.

Q. You are sure of that?

A. I am.

By the Court:

Q. What is the size of the distiller tank itself, without regard to anything else?

A. About 36 inches in height by 2 feet square.

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By Mr. Edwards:

Q. Mr. Mellon, are there plugs in steam lines on these Liberty ships?

A. There are.

Q. Do you know where they are located?

A. Too numerous to mention, yes. There are plugs in the steam lines for the after and the forward deck steam lines to furnish steam to the winches, the anchor windlass, and the mooring winch aft.

Q. How many plugs are there, have you any idea?

A. I wouldn't be able to tell you.

Q. More than a dozen?

A. That is according to what ship that would be on. They vary.

Q. That varies even within Liberty ships?

A. That's right.

Q. From what to what?

A. I still don't want to commit myself on that because I don't know. Some of them are fitted up with nipples and valves to drain it. Others are fitted up with plugs to drain the lines.

* * * * * * *

[fol. 58] By Mr. Davis:

Q. Mr. Van Diepen, will you state your name, occupation, and business address.

A. President of Atlantic Port Contractors, located at 103 Cuthbert Street, Philadelphia.

Q. Mr. Van Diepen, is the Four J's Engineering and Welding Company, Inc., a subsidiary corporation of Atlantic Port Contractors, Inc.?

A. That's correct.

Q. Do they have the same business address?

A. That's correct.

Q. Is that organization a subcontractor of Atlantic Port Contractors?

A. That's correct.

Q. As of February 5, 1951, did you enter into a master contract with the United States for the repair and alteration of Government vessels in the Philadelphia area?

A. That's correct.

Q. Do you have a copy of that contract with you this morning?

A. I believe so.

* * * * * * *

By Mr. Davis:

Q. Mr. Van Diepen, would you tell me the nature of the master contract.

A. General repairs.

* * * * * * *

Mr. Davis: Your Honor, we can shorten the time considerably if he will stipulate that by acceptance of a master contract he holds himself out as a specialist in the repair and alteration of seagoing vessels.

The Court: We have already passed that point months ago.

* * * * * * *

[fol. 59] By Mr. Davis:

Q. Mr. Van Diepen, on December 5, 1951, was the S. S. "Mary Austin" towed to piers designated by the Atlantic Port Contractors?

A. That's correct.

Q. Was that after the date of the contract for reactiva-

tion or repairs of the vessel had been awarded to Atlantic Port?

A. That's correct.

Mr. Weaner: What was the date?

Mr. Davis: December 5.

The Court: November 5, wasn't it?

Mr. Davis: November 5.

By Mr. Davis:

Q. Did your company, Atlantic Port Contractors, Inc., turn in a report of accident to Edgar Allen West?

A. We turned our report in to the insurance, yes.

* * * * * *

Q. Do you know what man in your employ executed the report?

A. I believe at that time Mr. Herdelin was in charge of that.

Q. Were any reports submitted to Atlantic Port Contractors giving an account of the accident in question to Mr. West?

A. I beg your pardon?

Q. Were any reports submitted to Atlantic Port Contractors giving an account of the accident in question and did any of your employees submit any reports to you, your company?

A. No, only West.

* * * * * * *

[fol. 60] By Mr. Davis:

Q. Mr. Van Diepen, to repeat the question, did any of your employees submit to you written, signed reports relating to the accident to Edgar Allen West?

A. Well, there are a lot of minor details I never concerned myself with. There were different people assigned to those, and evidently those are some of the reports which have been submitted.

Q. Those are some of the reports which have been submitted?

A. That is correct.

* * * * * *

By Mr. Davis:

Q. Mr. Van Diepen, would you tell the Court the names of your employees that sign the reports of accident.

A. Robert Kirchoff, Jaworski, Madden.

Q. Is Mr. Madden still alive?

A. No, he is not.

Q. Mr. Van Diepen, you have testified, have you not, that the S. S. "Mary Austin" was delivered into your possession for the performance of the reactivation contract?

A. That is correct.

* * * * * * *

By Mr. Weiner:

Q. Mr. Van Diepen, I note that none of these statements are dated. Can you tell us when they were made out?

A. I have no recollection on that, sir.

Q. Can you tell us when they were submitted?

A. Evidently right after the accident.

Q. Sometime after the accident?

A. Yes.

[fol. 61] Q. You don't know when?

A. Not exactly, no.

Mr. Weiner: No further questions.

(Statement of Robert Kirchoff was marked Exhibit U. S. 2 for identification.)

(Statement of Turk Jaworski was marked Exhibit U. S. 3 for identification.)

(Statement of James Madden was marked Exhibit U. S. 4 for identification.)

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By Mr. Davis:

Q. Mr. Herdelin, what was your position in 1951?

A. Payroll clerk.

Q. For what company?

A. Atlantic Port Contractors.

Q. Did you on November 23, 1951, execute a report of accident concerning Edgar Allen West on behalf of Atlantic Port Contractors?

A. I executed the form. I can't exactly remember the date, but it was shortly after the accident.

(Document entitled "Employer's First Report to Deputy Commissioner of Accident or Occupational Disease," was marked Exhibit U. S. 5 for identification.)

By Mr. Davis:

Q. Mr. Herdelin, I submit to you a report marked U. S. 5, that was produced by Atlantic Port Contractors this morning, and ask you if you executed this report.

A. Yes, sir.

Q. Would you read the statement made in item 18.

A. "On Engine top working on low pressure cylinder, pipefitter on top dropped 1" pipe plug approximately 30 ft and hit left knee cap."

[fol. 62] Mr. Davis: Your Honor, I would like to submit this as a Government exhibit.

The Court: It may be admitted in evidence.

(Exhibit U. S. 5 admitted in evidence)

By Mr. Davis:

Q. Mr. Herdelin, did you have any personal knowledge as to any accident occurring on November 21, 1951, to Edgar Allen West?

A. Yes. The usual policy of the company was to take the gentleman to the doctor, and then he would come up and make a report to us, because it was pertinent information that was required in these reports, and that is why we required the party that was injured, if physically able, to do so, to come up to the office to make the report.

Q. I asked you if you had any personal knowledge as to how the accident happened.

A. The personal knowledge I had was the knowledge that Mr. West gave me when he came up to make the report to me.

Q. Did he furnish you the information?

A. Yes, they were required to furnish us the information so we could make up the report. That was the policy of the company.

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By Mr. Weiner:

Q. Mr. Herdelin, you state, then, that you were told by Mr. West that a pipe fitter had dropped this plug down on him; is that correct?

A. That's right.

* * * * * * *

Q. Do you know whether or not you had any pipe fitters working above the main engine on that date?

A. We had pipe fitters working. Who they were or where they were working it wasn't my business to know.

* * * * * * *

[fol. 63] By Mr. Hoft:

Q. Mr. Herdelin, the date of that report is what?

A. November 23, 1951.

Q. And you say that information that is contained in there was given to you by the injured man?

A. Yes, sir.

Q. Is it fair to say that the information would have been given on the date that is mentioned in the report?

A. November 23? I couldn't say just exactly what date the man was up there, honestly.

Q. But it was sometime after the accident?

A. Sometime after the accident, yes, sir.

* * * * * * *

By Mr. Davis:

Q. Mr. Cameron, what is your occupation and address?

A. Marine engineer, 40 Jackson Place, Massapequa, New York.

Q. In November and December of 1951 were you in any capacity working in connection with the S. S. "Mary Austin"?

A. Yes, sir.

Q. In what capacity were you working with respect to that vessel?

A. "Mary Austin," a Government owned vessel, United States Lines, acting as general agency. I was delegated by the United States Lines to see that all work in connection with reactivation and special survey No. 2 were carried out in a satisfactory manner, in a safe operating order.

Q. What was your position?

A. Port engineer.

Q. In general, what was to be done on the S. S. "Mary Austin"? What was the reactivation to accomplish?

A. The ship being up in a dead fleet base was to be put into service. The reactivation was the opening-up of all [fol. 64] machinery and the parts thereof, place in safe working condition, and the carrying-out of special survey No. 2 in connection with this item.

Q. When an item set forth in the specifications had been completed by the contractor, did you have any function in connection with the completion of that item?

A. When an item on the specification has been opened up, such as a pump could be, all work pertaining to that pump or parts thereof were to be inspected, checked by our people, American Bureau and Coast Guard, closed up in proper order, and tested out.

Q. Were you furnished with a copy of the specifications?

A. Yes, sir.

Q. Do you have a copy of the specifications that were furnished to you?

A. Yes, sir.

Q. Do you have it in your possession now?

A. Yes (producing a document).

Q. I refer you to item 5, page 3, of the specifications.

A. Item 5. "Boiler, Feed Lines and Steam Line Valves."

Q. Would you tell the Court what was to be performed under that specification.

A. Do you want me to read the item?

Q. Yes, read the item.

A. "Boiler, Feed Lines and Steam Line Valves (U.S.C.G. & A.B.S. Requirements)

"The contractor is to open up, grind in, machine seats and discs, repack, rejoint, and after inspection by all

concerned and when directed, close up in good order. All missing or defective studs, nuts, bolts, or cotter pins are to be renewed by the contractor.

"This is to include all valves mounted on boilers and in steam and feed lines, all safety valves, blow down and bulkhead stop valves, and where valves are fitted with a by-pass line is to include such by-pass valve, superheater drain valves and throttle drain valves."

[fol. 65] Q. What was the contractor to do under that specification?

A. Carry out all work as directed under this item, which I have marked completed.

Q. I refer you to item 11 on page 6 of the specifications and ask you to read that specification.

Mr. Hoft: Sir, it seems to me these items of the specifications also speak for themselves. They were admitted at the pre-trial conference.

The Court: I will let them be read, though. They are pinpointing the particular item of the specification, which I would require them to do in any event, Mr. Hoft.

A. Item 11(n).

"Water Service Lines

"Connect up all water service lines for main engine and line shaft bearings and prove same in good order. Also connect up all other lines and valves directly attached to main engine which have been opened and disconnected for drainage purposes. Contractor shall furnish and install all missing or defective piping, valves and fittings."

By Mr. Davis:

Q. Would you read item 36, page 11.

A. Item 36.

"Engine Room Pressure Tanks (USCG Requirement)

"Four engine room surge tanks now opened:

"(1) Sanitary system

"(2) Cold fresh water

"(1) Hot fresh water

"Clean out tanks for internal examination. Replace hand hole plates using new gaskets, fill with fresh water and test to satisfaction of U.S.C.G. This to include all valves, pipe lines, etc., for above system."

Q. Would you read item 38, page 12.

A. "38. Evaporator and Distiller (A.B.S. & U.S.C.G. Requirements)

[fol. 66] "(a) Open up evaporator and distiller for inspection by A.B.S. and U.S.C.G. Remove coils to shop, clean, anneal and test hydrostatically.

"Machine scale interior of shell.

"Renew baffle plates. Replace coils and when passed as satisfactory, close up in good order.

"Free up all working parts, renew all gaskets and any missing or defective studs, nuts or bolts.

"Renew missing or defective zinc plates.

"(b) Drill test hole in shell as directed, tap $\frac{1}{4}$" hole and install plug after inspection by U. S. Coast Guard Inspector."

Q. Item (c), was that performed, Mr. Cameron?

A. Item (c) was canceled.

Q. Read item 100 on page 22.

A. "100. Steam and Exhaust Lines, Fresh Hot and Cold Water Lines, Sanitary and Salt Water Lines and Firelines.

"All the above mentioned have been opened for drainage purposes.

"Contractor shall reconnect all the above, including removing blanks in way of overboard valves and install removed section of pipes and valves.

"This will include connecting up of sanitary system, fresh water system, heating system, water service lines, fire lines, steam and exhaust lines, etc., throughout the vessel.

"All drainage plugs removed in way of pipes and machinery are to be reinstalled.

"Contractor shall furnish and install all missing or defective valves, pipes, plugs, fittings, shower heads and flushometers.

"All missing and defective insulation in way of the above repairs are to be removed.

"Upon completion of above repairs, test out and prove all systems tight and ready for service."

[fol. 67] Q. Would you read item 103 and the notes following item 103.

A.

"103. Auxiliary Machinery

"Close-up all engine room equipment where opened for drainage, using new joints and packing and furnishing new bolts and nuts as found necessary, principally:

"(a) Fire pump and Bilge Ballast Pump

"(b) Line Bilge Pumps and Manifolds

"(c) Air pump and Manifold and connected fittings

"(d) Feed Pumps (2)

"(e) Sanitary Pump

"(f) Auxiliary Circulator

"(g) Auxiliary Condenser

"(h) Main Condenser and Circulator

"(i) General Service Pump

"(j) Steam and Electric fresh water pumps

"Note: This item includes all auxiliary machinery and main engine and appurtenances in engine room and fireroom and also includes all steam, exhaust, water and other hydraulic lines, valves, manifolds, reducers, fittings, containers, evaporator, feed water heater, etc., and replacing part existing and or renewing all removed plugs, nipples, valves, unions or fittings and reconnecting any disconnected parts or pipes. Contractor is to satisfy himself as to all requirements necessary to complete this item."

Q. Mr. Cameron, do you have anyone to assist you in the inspection of the repair work being performed by Atlantic Port Contractors?

A. There was an assignment of the chief engineer, O'Connor; Captain T. G. Kazso; Chief Mate Haus; Second Officer Greenberg; and the steward.

Q. How were these men employed? Did they sign on articles?

[fol. 68] A. No, that was a weekly payroll.

Q. Who kept the weekly payroll?

A. Pardon?

Q. Whose weekly payroll was it?

A. United States Lines.

Q. The general agent?

A. The general agency.

Q. Did you issue any instructions to the individuals assisting you in connection with this work as to what they were and were not to do in connection with the repair and inspection?

A. Well, their instructions were to see that all work was carried out satisfactorily, and when any part or units were opened up ready for examination, they were to inspect it, and if same proved satisfactory to all interested parties—that's including the Coast Guard and A.B.S.—close up in satisfactory manner. They were actually going around inspecting. That was their job.

Q. Were they participating in any way in the reactivation work?

A. They had no hand in that at all. They had nothing to do with that.

Q. Was there any instruction issued to them in that connection?

A. Well, their instructions were not to interfere with the contractor, hands off all operating gear, and just carry out the routine inspection as stated.

Q. Who issued those instructions?

A. I did.

. . . . . .

Q. Do you have an approximation of when the vessel arrived at Atlantic Port Contractors pier?

A. I believe it was—I can say it was the 5th of November.

Q. And when was the job finished and re-delivered to the Government?

[fol. 69] A. The job was completed on the 12th of December.

Q. What period of time is that?

A. Well, from the 6th, I believe the time was, when they started the job, until the 12th.

Q. How many weeks, roughly?

A. About five weeks.

* * * * * * * * *

Q. Let me suggest this, that all of the specs that you have read could have been done two days before the ship was finished and re-delivered; that is correct, isn't it?

(No answer)

Q. Your answer is yes?

A. I wouldn't say yes, no.

Q. It is possible?

A. No, it wouldn't be possible.

Q. You are saying that it had to be done before that time?

A. Well certain parts tie in together with other items.

* * * * * * * *

By Mr. Weiner:

Q. Mr. Cameron, you say you were port engineer for the U. S. Lines at that time?

A. Yes, sir.

Q. And you were then in general supervision of all the officers of the ship?

A. Yes, sir.

Q. I understand there were a master, two mates, and two engineers aboard.

A. Yes, sir.

Q. And they were aboard, of course, as representatives of U. S. Lines?

A. Yes, that's right.

Q. And they were, of course, responsible for the ship?

A. Not responsible for the ship.

[fol. 70] Q. The master was not responsible for the ship?

A. We were there. He was assigned to the vessel. The responsibility was not under his control. We didn't take delivery of the ship.

Q. What were the master's duties?

A. Well, on all ships, when it is laying on the pier, they assign a master to that job.

Q. What are his duties?

A. His duties are to make out a weekly payroll, report to his office, intercede and contact the agents.

Q. That is all?

A. Well, it is more or less like that until things get organized and get under way, and if we start moving a crew in, then, of course, he makes assignments. It is more or less like that at the beginning. This ship was on idle status.

Q. You say he has no responsibility for the vessel?

A. More or less he has some, but he doesn't assume full responsibility for the protection of the vessel, due to the fact it is going through a reactivation period.

Q. And you say that he was assisting you on these periodic inspections?

A. The captain?

Q. Yes.

A. Yes.

* * * * * * *

A. That's right.

Q. Now, if during your inspection you saw that work was being performed in what you thought was an improper manner, would you do anything about it?

A. Well, I would take it up with the contractor. I would take it up with the supervisor of the vessel, and if I didn't get any proper action, I would take it up with Mr. Van Diepen, which I got full cooperation. I will say that. Let me put it this way: This ship made a trip and came back with no deficiencies, so that answers it right there.

[fol. 71] By the Court:

Q. You still haven't answered the question that was asked you, though, Mr. Cameron. If you saw a man performing work in a manner that didn't suit you, do you mean to say, when you could correct it by telling him how to do it, that you wouldn't do that, you would take it up with the contractor and bring all of this procedure into play?

A. Your Honor, I wouldn't directly tell the man himself. I would take it up with the ship supervisor and let him straighten the situation out.

* * * * * * *

Mr. Davis: May it please the Court, I would like to offer into evidence the master contract and specifications that have been testified to.

The Court: They may be offered. Are you substituting a photostat for the original?

Mr. Davis: Yes sir, Your Honor, but they are certified.

(Photostatic copy of master contract was marked Exhibit U. S. 6 and received in evidence.)

(Photostatic copy of specifications was marked Exhibit U. S. 7 and received in evidence.)

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By Mr. Davis:

Q. Mr. Clausen, what is your occupation and address?

A. My occupation is marine surveyor for the U. S. Maritime Administration, 488 Mulberry Lane, West Hempstead, New York.

Q. In November and December of 1951 were you assigned to any duties with respect to the S. S. "Mary Austin"?

A. I believe it would be the last of November and the completion of December, the twelve days of December and the last of November.

[fol. 72] Q. What was your assignment?

A. As marine surveyor.

Q. What was your function as marine surveyor?

A. To represent the U. S. Maritime Administration in seeing that the specifications were carried out as stated, to represent the Maritime Administration in it, any additional work that would be required to see if it was necessary and also place it in hand. Estimate and price the work that was being performed, additional work.

Q. With respect to the boiler and water system of the S. S. "Mary Austin" that was being reactivated in November and December of 1951, where does that part of the work fit into the general plan of reactivation of the vessel?

A. The general procedure in order to complete the vessel in a required time would be to start the boiler cleaning and boiler repairs that would be necessary. That would have to be started immediately, and, of course, all of the lines dealing with the boiler, your feed lines and tanks, any part of it, in order to put the system in operation, that would have to be the first steps taken.

Q. Are you acquainted with the condition of vessels as they come out of the laid-up fleet?

A. Yes.

Q. What is the condition of the water lines?

A. In the laid-up fleet the vessel is preserved with an oil which is pumped through the boiler, water and the firesides of the boiler, through all of your steam, water and condensate lines to preserve them during the laid-up period.

Q. Are these water lines drained?

A. Prior to being placed in the laid-up fleet the entire system is drained, completely drained, before being placed in the laid-up fleet.

Q. Are you acquainted with the specifications for the reactivation of the S. S. "Mary Austin"?

A. Yes, I am.

Q. Do those specifications require a complete check and [fol. 73] a complete cleaning, complete repair, for the entire water system?

A. It does.

Q. Is there a skeleton crew employed during the reactivation period?

A. You are talking in terms of for the United States Lines on this. They would have men employed to assist in the inspection of the vessel. The skeleton crew would not be employed until the boilers had been satisfactorily, until one boiler had been satisfactorily passed by the Coast Guard, then a skeleton crew would be hired to operate that particular boiler. Until that had been completed, the work on the one boiler had been satisfactorily complete, there would be no operating crew at all.

Q. Was there a time limit for the performance of this contract?

A. 28 days from the starting date, which would be December 3.

Q. Did the contractor beat that time limit?
A. No, there was an extension.

* * * * * * *

By Mr. Davis:

Q. Did this contractor pay the penalty for finishing late?
A. I believe that he did. We had a conference on the thing after it was completed, in Mr. Berg's office. As to the actual, whether the case was continued to penalty or not, I have no record, but I know that we did ask for penalty money for incompleted.

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[fol. 74] By Mr. Davis:

Q. Were you employed by United States Lines in November, 1951?
A. Yes, sir.
Q. In what capacity?
A. First assistant engineer.
Q. What were your duties during November of 1951 as first assistant engineer?
A. I was to assist the chief engineer, and Mr. Cameron, the port engineer, by making routine inspections and reporting back the findings I found.
Q. Did you have charge of any of the Atlantic Port Contractors workmen?
A. No, I did not.
Q. Did you ever give orders to any of the Atlantic Port Contractors workmen?
A. What do you mean, tell them what to do?
Q. Yes.
A. No, I did not.
Q. Did you have any instructions, written or oral, as to your authority over the workmen for Atlantic Port Contractors?
A. Did I have any instructions?
Q. Yes.
A. Over the Atlantic Port Contractors?
Q. Over the workmen of Atlantic Port Contractors.
A. The instructions I had were from the chief engineer

and Mr. Cameron, to inspect machinery, equipment, and what I found wrong, report back to him, but not to instruct the Atlantic Port men what to do.

Q. Did you ever instruct any of the Atlantic Port men what to do?

A. No, I did not.

Q. Do you know a man by the name of Edgar Allen West?

A. Yes.

* * * * * * *

[fol. 75] Q. Did Mr. West ever say anything to you with respect to being involved in an accident on November 21, 1951?

A. Yes, he did. Mr. West, and there was a short, fat fellow that told me he was from Portland, Oregon, on the West Coast. I think he said, I am not sure whether it was Portland, Oregon, but he said he was from the West Coast. Mr. West sat down in front of the butterfly valve and the throttle valve and told me he hurt his knee. Now, which knee, I do not recall. He did pull his pants up and show me his knee, but it was normal, to my recollection. He then, as I know, he was still working and did work.

Q. Was this on or before November 21, 1951?

A. I wouldn't say. I don't recall what date it was, whether it was November 21, or December, or what. I wouldn't know.

Q. But he continued work?

A. Yes.

Q. Did he tell you how he had suffered this injury to his knee?

A. No, he did not.

Q. Did you ever see Mr. West lying on the second grating in an injured condition?

A. No, sir.

* * * * * * *

Q. Did you ever observe Skelton standing over West when West was lying in a prone condition injured?

A. No.

Q. Did you ever instruct Skelton to get West out of the engine room?

A. No, sir.

Q. Did you ever see them carry West up a ladder out of the engine room?

A. No, sir.

Q. Did you ever see any water, in November of 1951, coming down from the upper grating of the engine room?

[fol. 76] A. No, sir, I have not.

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By Mr. Edwards:

Q. I ask you to think back and tell us, if you will, just what did Mr. West say on that occasion, as you recollect?

A. There are two main steam lines tie into the front of the engine, and there was work being performed up there by three men, and West, as I recall it, said that he hurt his knee. I don't recall whether he was sitting on a tool box or what, and he showed me his knee, but he did not say how he hurt it or anything.

* * * * * * *

By Mr. Weiner:

Q. Now, Mr. Boothe, as first assistant engineer aboard this ship, if you saw that the employees of Atlantic Port Contractors or other contractors aboard the vessel were doing work in an improper fashion, what would you do about it?

A. If I seen an individual, is that the question you are asking?

Q. That's right, either one or more persons.

A. One or more persons doing work improperly?

Q. Doing work in an improper fashion, what would you do about it?

A. Well, I would have to go to my superiors, which I am employed by, to inform them of the type of work that would be going on, or I would go to the supervisors of the contractor and inform him.

Q. Under those circumstances would you say anything to the man who was standing right before you doing the work improperly?

A. Absolutely not.

[fol. 77] Q. And the FBI took a statement from you three weeks ago?

A. I made the statement, yes.

Q. Before that no one ever approached you about this?

A. About this particular party?

Q. About this case.

A. I think your office sent me a letter and asked me would I be a witness for you.

Q. We sent you a letter and asked you what you knew about it; is that correct?

A. That's right.

Q. And in response to that letter what happened?

A. I called your up and said I knew nothing about the case.

Q. Mr. Boothe, that was shortly after the accident, wasn't it?

A. No, it was not.

Q. About how long after that was it, do you recall?

A. Two and a half years afterwards.

Q. Two and a half years ago?

A. No, about two years ago.

Q. You didn't say anything to us at that time in that conversation about Mr. West having reported to you that he hurt his knee, or anything like that, did you?

A. You wrote me a letter referring to a person that fell overboard, and also other clients that you had.

Q. That fell overboard? I am talking now with reference to Mr. West. You say that you got a letter about that and you called our office; is that correct?

A. I received a letter that someone was hurt on the gangplank, did I know anything about that. I think also that they referred to West. That is all I can remember of it. That was 1953.

Q. That is right, and as a result of that letter you called our office and told us you didn't know anything about it; is that correct?

A. Yes.

[fol. 78] By Mr. Davis:

* * * * * * *

Q. Where were you employed in November of 1951?

A. Atlantic Port.

Q. You were employed aboard the S. S. "Mary Austin"?

A. Yes, I was.

Q. Where did you work on the S. S. "Mary Austin"?

A. Well, all around the ship, mostly in the engine room.

Q. Pardon me?

A. Mostly in the engine room, but all over the ship.

Q. What was being done to the vessel at that time?

A. Recommission, to put back in order.

Q. What?

A. Overhauling it.

Q. Did you know a man by the name of Edgar Allen West at that time?

A. Yes.

Q. Did West ever complain to you of being injured aboard the S. S. "Mary Austin"?

A. Yes, he did.

Q. When?

A. The day that the plug hit him on the knee.

Q. Could you give us a little bit more detail as to the time at which he complained about the plug hitting him on the knee?

Q. What do you mean, little more detail?

Q. What were the conditions under which he complained to you?

A. Well, I was working down below. I was on the bearings and he was on the cylinders, and I heard him holler, and the water come down, and I went up, and he was rubbing his knee. He said the plug hit him on the knee, and if it would have hit him on the head, it would have killed him.

Q. In other words, he was working on a level above you?

A. Yes.

[fol. 79] Q. West was working on the engines?

A. He was working up top on the cylinders.

Q. Was anyone working with him?

A. Well, as I recall, there was a short, fat fellow, Shorty, was working with him.

* * * * * * *

Q. Do you know what they were working on at the time?

A. On the low-pressure cylinder, on the rings, I believe.

Q. What happened?

A. What happened?

Q. Yes. You said you heard something up above. What happened?

A. Why, he said somebody took a plug out from up above and dropped it and hit him on the knee.

Q. What time of day was this, Mr. Learmouth?

A. What kind of day?

Q. What time of day.

A. It must have been shortly before lunchtime, either shortly before lunchtime or shortly before quitting time.

Q. Where was West when you came up this next grating? Where was he?

A. In the cylinder yet.

Q. He was still in the cylinder?

A. Yes.

Q. What was he doing?

A. He had his pants up, rubbing his knee.

Q. What else? Was he doing anything else?

A. Just rubbing his knee and complaining, that is all.

Q. How was he complaining?

A. About somebody being careless, dropping a plug on him.

Q. Dropping a plug on him from above?

A. Yes, you know; careless, his knee hurt him, and if it hit him on the head it would have killed him.

Q. Did you look up above?

A. Yes, I looked up above.

[fol. 80] Q. Did you see anyone up there?

A. I thought I saw a couple of men, I am not too sure, but I figured it was somebody working up there.

Q. Did they come down?

A. I don't know. I didn't stay long. See, I just went up to see what it was, then I went right back to work. I only stayed there a couple of minutes.

Q. Incidentally, did you see any water coming down?

A. Yes, I did. It come down to our level, too. It come down on us. Another fellow and me working on the bearings, we got splashed.

Q. What did West do after he told you what had happened?

A. What did he do?

Q. Yes.

A. He was just rubbing his knee when I saw him and when I left him.

By Mr. Davis:

* * * * * * *

Q. In November and December of 1951 did you work on the S. S. "Mary Austin"?

A. Yes, sir.

Q. What was your position?

A. Superintendent.

Q. In charge of the workmen?

A. That is right, sir.

Q. Did you know a man by the name of Edgar Allen West?

A. Yes, sir.

Q. How long had you known West?

A. Oh, I would say about probably six months.

Q. You had known him about six months?

A. Yes.

* * * * * * *

Q. Had you worked with Mr. West on any other vessels that were repaired or reactivated by Atlantic Port?

[fol. 81] A. Yes, sir.

Q. You have?

A. That's right, sir.

Q. Did Mr. West ever complain to you during your work on the other vessels being repaired by Atlantic Port about having a bad knee?

A. No, sir.

Q. Did you ever notice West limp?

A. What's that, sir?

Q. Did you ever notice West limp during that period of time?

A. I never saw him limp, no, sir.

Q. Did West ever tell you that he had a bad knee before November 21, 1951?

A. Yes, sir.

Q. Your answer was what?

A. Yes, sir.

Q. That was prior to his alleged accident aboard the S. S. "Mary Austin," was it not?

A. Yes, sir.

Q. When did he tell you that he had a bad knee?

A. Well, I met him in Horn & Hardart's restaurant a couple of mornings, and I asked him why he wasn't working. He told me he had a bad leg. So I said, "When you get straightened up, come on back to work."

By the Court:

Q. Wait a minute. You have answered the question, and you said that he said he had a bad leg; is that right?

A. That's right, sir.

Q. He didn't then specifically mention the knee, just a bad leg; is that what you are telling me?

A. Yes, sir.

By Mr. Davis:

Q. At the time you met Mr. West at the Horn & Hardart restaurant, did you tender him employment?

A. Did I what, sir?

[fol. 82] Q. Did you offer him employment?

A. Oh, yes, yes, sir.

Q. What did you tell him?

A. I told him, "When you get straightened up, come on back to work." I just thought it was minor, a sore or something.

Q. Did you tell him you would give him an easy job?

A. Yes, sir.

Q. After you were employed aboard the S. S. "Mary Austin" did you ever direct Mr. West to take a blow-off valve off of a boiler?

A. That's right, sir.

Q. Did he complain of a bad knee during the time he was performing this job?

A. Yes, he did, that one particular night. That was in the evening. I recall that very distinctly.

Q. I am sorry, Mr. Kirchoff, I can't hear your answer. Would you repeat it.

A. Yes, he did, that one particular time when he was working on the valve, on that boiler. He was down on his knees and taking these nuts off.

Q. What did he say?

A. He said his leg was bothering him pretty bad, you know.

Q. Do you know the time when you directed Mr. West to take this blow off valve off?

A. Oh, that was overtime. I would say that was around 6 or 7 o'clock in the evening.

Q. Was it before November 21, 1951?

A. Oh, yes, yes, sir.

. . . . . .

By Mr. Edwards:

. . . . . .

Q. Will you tell us just what Mr. West said, as you best recall it.

A. To the best of my knowledge, I was in the restaurant [fol. 83] first, had some coffee, possibly about 7:30, and Mr. West come in. I asked him was he going to work today. He said no, his foot was bothering him, knee or leg or something.

Q. I didn't hear that.

A. He said his foot was bothering him, his leg was bothering him, or something like that.

Q. Did he use the word "knee"?

A. I couldn't recall. He probably did.

Q. He probably did. Did he indicate to you which knee or leg it was, the left or the right?

A. No, sir.

Q. What else was said?

A. We were standing there talking about the job, and a few other things, you know, general routine, and I said, "When you get straightened up, come on back to work. I will put you on an easy job, give you something easy to do."

Q. Did he come back to work then?

A. I believe he come back the following day or a couple of days later. I am not sure.

Q. Did you give him an easy job?

A. Yes, I told my leading man to put him down on pumps, working around the pumps, and so forth.

Q. Why did you do that?

A. Well, I didn't want to give him no heavy work. He had a bad leg or something, didn't want no heavy work.

* * * * * * *

By Mr. Weiner:

* * * * * * *

Q. Mr. Kirchoff, isn't it also a fact that you told your leading man to assign him to certain work on the valves and on the engine because he had engineering experience?

A. Well, could I answer that? On that particular day it seems that I can't recall being on the vessel. I was there in the morning to assign the men to the various jobs, and I understood that Mr. West was working around the pumps. [fol. 84] Q. I am sorry, Mr. Kirchoff, I believe you misunderstood the question. I believe you testified in answer to Mr. Edwards that you told your leading man to assign West to working on the pumps and the valves, and things like that.

A. That's right, sir.

Q. Now I am asking you whether or not you had him assigned to that work because he had the training, the engineering experience, to do that kind of work that required special skill.

A. That's right, sir.

* * * * * * *

By Mr. Hoft:

Q. Mr. Kirchoff, you talked about assigning West to a job for which he had special skills.

A. That's right, sir.

Q. Do you know what job he had?

A. The last time I saw Mr. West—

Q. What job did he have down here at Atlantic Port?

A. He was a general all around machinist.

Q. Do you know his hourly rate?

A. Whatever the rate was. There is a Union scale on that.

Q. Will you refer to that card and state what his hourly rate was.

A. $1.71.

Q That is not particularly special skill, is it?

A. Yes.

Q. Is $1.71 a high rate?

A. High rate.

Q. Do I understand your testimony that $1.71 was the rate for a machinist at that time?

A. Will you repeat that?

Q. $1.71 was the rate for a machinist in 1951?

A. Yes, first-class machinist, $1.71.

[fol. 85] By Mr. Davis:

Q. Mr. West, what is your Social Security number?

A. My Social Security number, I forget what it is now.

Q. Do you have a card with you?

A. Let me see. My Social Security number is 567-10-6571.

Q. Mr. West, have you ever used any name other than Edgar Allen West?

A. Well, at one time there, I think up there when we had that job, that they made a mistake. He put on Edwin A. West instead of Edgar A. West.

Q. Have you ever used the name of Eugene Albert West?

A. No, sir. E. A. West was how I gave it to him.

Q. You did not use the name of Eugene Albert West?

A I don't think so.

Mr. Davis: All right, no further questions.

Mr. Davis: Your Honor, counsel is willing to stipulate that the Eugene Albert West on the Social Security number 567-10-6571 is the same Edgar Allen West.

By Mr. Davis:

Q. What company do you work for?

A. Todd Shipyards Corporation, Brooklyn Division.

Q. Are you here pursuant to a subpoena issued by the United States to produce the employment records for

Eugene Albert West, August 24, 1952, to November 23, 1952?

* * * * * * * *

[fol. 86] By the Court:

Q. Go ahead, answer the question, Mr. Gossner. Is there any reference in that medical examination to a prior knee injury?

A. No.

By Mr. Davis:

Q. Mr. Gossner, do your records show that Mr. West suffered any injury while working for Todd Shipyard?

A. Yes, the record shows he made an appearance at our dispensary under date of December 17, 1952, claiming an injury, stating, "I was climbing up on a scaffold. The scaffold slipped and I fell, hitting my chest and back, and there was water on the deck and I got a chill"—claiming this happened on November 27, 1952.

Mr. Davis: Your Honor, I would like to offer those two documents in evidence.

Mr. Weiner: Which two documents?

Mr. Davis: I mean the physical examination given to Mr. West and the record of the accident which occurred to Mr. West while working for Todd Shipyard.

Mr. Weiner: The physical report I will object to. The other one I have no objection to.

The Court: I will take it for the limited purpose. I am not going to accept any statements of opinion or otherwise.

Mr. Davis: I appreciate that.

The Court: And you are willing to stipulate that it is not in Mr. West's handwriting?

Mr. Davis: That it is not in his handwriting.

The Court: Yes, the medical examination.

The Witness: No, it is in the nurse's handwriting.

Mr. Davis: Yes, sir. Your Honor, I will so stipulate.

The Court: All right, then I will admit it. I will admit them both.

[fol. 87] (Document headed "Employer's First Report to Deputy Commissioner of Accident or Occupational Disease" was marked Exhibit U. S. 8 and received in evidence.)

(Document headed "Employee's Medical History Record" was marked Exhibit U. S. 9 and received in evidence.)

Mr. Davis: Your Honor, since these are permanent records of Todd Shipyard, I would like to make a motion that we be allowed to photostat them and put them back into evidence as photostated.

The Court: Certainly.

(Photostats substituted for exhibits U. S. 8 and 9.)

* * * * * * *

Cross examination.

By Mr. Edwards:

Q. Mr. Gossner, I show you a paper which has been marked for identification as Atlantic Exhibit No. 1. Will you tell us what that is.

A. That is the man's pre-employment application.

Q. How is it filled out? Will you tell us that.

A. By the man himself.

Q. Is that application signed?

A. Yes.

Q. And it is signed by whom?

A. Eugene Albert West.

Q. And is there a Social Security number given there?

A. Yes. It looks like 567 10 6571.

Q. You say this paper is in the handwriting of the applicant?

A. Yes.

Q. Will you tell us what it shows under date of birth?

A. September 18, 1893.

[fol. 88] Q. Is there an entry connected with education on this card?

A. The card says "Education: highest school attended."

Q. What is written in after that?

A. High.

Q. What else appears?
A. "Graduate: yes."

Q. On the reverse of the card will you tell us what it shows as far as the applicant's age is concerned?
A. 59.
Q. And occupation?
A. Boilermaker.
Q. Amount of experience?
A. 36 years.
Q. Was Mr. West who signed this card assigned an hourly rate?
A. Yes.
Q. What was that, sir?
A. $1.80.
Q. What was the date of hiring?
A. 8-19-52.
Q. And what craft was he hired under?
A. Boilermaker.
Q. Do you have with you the original of the payroll record?
A. Yes.
Q. Showing this man's earnings over the period of time that he worked for Todd Shipyard?
A. Yes.

Mr. Edwards: Would you identify this.

(Photostatic copy of payroll record, Todd Shipyards Corporation, was marked Atlantic Exhibit 2 for identification.)

Q. I show you a paper that has been marked Atlantic Exhibit 2 and I will ask you to compare that with the orig-
[fol. 89] inal of the payroll record that you have in your possession and tell me whether it is an exact copy.
A. Yes, it is.
Q. It shows what as far as the beginning and ending dates of employment are concerned?
A. That's right.
Q. What does it show, Mr. Gossner? When did Mr. West start to work for Todd, according to that record?
A. August 19, 1952.

Q. And he last worked when?

A. He had pay, the last pay, was the week ending November 23, 1952.

Q. And this shows his hourly rate, does it, and his craft classification?

A. Yes.

By Mr. Weiner:

Q. Mr. Gossner, Mr. West had applied to your plant for employment as a boilermaker; is that right?

A. That's right.

Q. And he was accepted for that job; is that correct?

A. Yes.

Q. Do your records show why his employment was terminated?

A. He was removed from the active payroll on December 9 for a 12-day absence.

Q. Is there any notation on your records as to the reason for the absence?

A. No. We remove all employees after 12 days absence.

Q. Now, on this re-employment application you ask only for at least three years experience, is that right, that is at least three years prior experience?

A. That's right.

Q. And since he was applying for a job as a boilermaker, you were interested in his experience as a boilermaker; is that correct?

[fol. 90] A. That's right.

Q. You weren't interested in any other experience or skills that he might have had?

A. No.

Q. During this period that he was employed at your shipyard from August 24 to November, what was the date of termination, sir?

A. The week ending 11-23 was the last pay that he drew.

Q. He was actually removed from the payroll on December what, sir?

A. December 9.

Q. During that time would you term his employment as

steady? In other words, did he report for work ... ularly and work full weeks?

A. Yes.

Q. Does that show in your records?

A. Well, he didn't work full weeks. He was employed steady from the 19th of August to the 20th of November.

Mr. Edwards: With the Court's permission, at this time I would like to offer in evidence Atlantic's Exhibits 1 and 2, being the photostatic copy of the pre-employment application and the photostatic copy of the payroll records.

The Court: They may be received.

(Atlantic Exhibits 1 and 2 received in evidence.)

By Mr. Davis:

Q. Mr. Loughney, will you state your occupation and address?

A. Business manager, the International Brotherhood of Boilermakers, Iron Shipbuilders and Helpers of America, Local 803, 60 South Second Street.

Q. Did you hold that position during the year 1951?

A. I did.

[fol. 91] Q. Did Mr. Edgar Allen West contact you prior to November 20, 1951, to secure work?

A. Yes, he did.

Q. Had you known Mr. West prior to that time?

A. No.

Q. Did you make any observation of Mr. West with respect to his physical condition at that time?

A. The story is he came into the Local Union seeking employment.

Q. You say the story is. Is this your observation?

A. That's right. He came into the Local office looking for employment, and I interviewed him. He told me that he has been a prior member of the Boilermakers Union and that he has been sick for some time, and looking at his condition at that particular time I could realize that. He told me he had no money, no way of getting along, unless he could get a job. I went along with that, talked to him about

the Local Unions that he worked in. He mentioned that he had come from out West and he had been a member of the Boilermakers Union all his life, and taking that into consideration, the fellow being an old fellow, I felt that I would try to help him to get a job. He spoke about his sickness. He also, I am positive, spoke about his knee.

Q. Which knee?

A. Just about one of his knees that went out of joint. I am practically pretty near positive that he spoke about that.

Q. Did he designate whether it was his left or right knee?

A. No, he didn't.

Q. Did you ever observe him walking?

A. Oh, yes. I took notice to him at that time, and, of course, being an old gent, I was in doubt whether or not the companies would accept him, but realizing that he had no money and no way of getting along, it has been the past practice of the Brotherhood of Boilermakers Local Unions to take care of any of its members when they are down, or [fol. 92] if they come into a Local Union looking for support, they usually get a couple of dollars to get along and a job if there are jobs available, and that's how we treated this fellow. Since he has been in the hospital, that he told me, and couldn't pay his Union dues in his prior Local, I gave him a lot of consideration.

Q. Did you observe him limping as he walked?

Mr. Weiner: If Your Honor please, I object to that as leading.

A. Yes.

By Mr. Davis:

Q. Did you observe him as he walked?

A. Yes. He didn't look very healthy at the time.

Q. Would you describe his walking?

A. He was limping.

Q. Do you have any recollection as to whether he was limping on his left or right leg?

A. No, I don't.

Q. Well, after Mr. West contacted you for employment, what did you do?

A. I had him sign an application for membership in the Union. I then told him that the Atlantic Port Contractors had a job at Pier 9 North Wharves and to go over there, and I gave him, no doubt gave him, a slip or recommended for him to see someone and to tell them to try to take care of him. He signed a reinstatement with our Local Union, Local 803, and I sent this application off to Kansas City, which is our International Headquarters, who processes these applications and then forwards back to our Local Union the history of the member who was being reinstated.

I would like to read off to you the history.

Q. All right.

A. He became a member of Local 216 in 1905 at the age of 19 as a mechanic. That's in El Paso, Texas. He left [fol. 93] Local 216 and cleared into Local 98 on 2-1-23, and then into Local 24, he transferred into Local 24 9-1-46. That's in Tulsa, Oklahoma. Then from Local 24 9-21-44. From 9-21-44 to the time that he came into our Local Union there was no doubt some delinquency in his Union dues there.

By Mr. Weiner:

Q. What was that, sir? I didn't hear it. What was the last part of your answer, sir?

A. There was no doubt some delinquency in his Union dues, because he was delinquent when he came into our office, and I had him sign a reinstatement form which I forwarded off to Kansas City for his reinstatement.

By Mr. Davis:

Q. Mr. Laughney, during February, 1953, did you again have contact with West?

A. Approximately a year after he filed a claim against this company I contacted him working at a launch service down on the avenue and got hold of him and I asked him why is he causing our people a lot of trouble. It is so hard for the contractors to get proper insurance to be able to stay

in business without having people like him going around trying to sue people and create a lot of trouble for us which would put our contractors out of business. I did say that to him.

Q. Did you remind him of your prior conversation with respect to his physical condition at that time?

A. I told him, "You knew you were in bad shape when you came into the office, and myself wanting to help you because of your age, you had no business to do this."

Mr. Davis: No further questions.

* * * * * * * *

[fol. 94] Cross examination.

By Mr. Edwards:

* * * * * * *

Q. When did he first make application in your Local, sir, or for reinstatement?

A. A few weeks prior to 11-26-51. His book was sent in from our International Headquarters in November, 1951.

Q. Would it be correct to say, then, that he first made application to you either for reinstatement or membership sometime in November, 1951?

A. Yes, according to the records.

Q. Did you know that at that time he was already working for Atlantic Port Contractors?

A. When he came in to me he told me that he wasn't working for anyone and that he needed a stake, he had no money, no way of getting along.

Q. Is the answer to the question that you did not know that at that time he was already working for Atlantic Port Contractors?

A. The time he came in to me he was not working for the Atlantic Port Contractors, no.

Q. So far as you know?

A. I know.

* * * * * * *

Q. Did you feel that in the physical condition as you saw him he was able to do his job as a member of your Union with any contractor that you might send him to?

A. All I seen was a man that was formerly a boilermaker, part of our organization, that needed a dollar.

Q. Will you answer my question. Was he, in your opinion, from your observation, able to do his work as a boilermaker?

A. No.

[fol. 95] Q. But despite that you sent him down to Atlantic Port Contractors, you say?

A. Despite that he had to be taken care of.

Q. Did you send him down to Atlantic Port?

A. I sent him to the Atlantic Port Contractors plus other plants on the waterfront that were hiring men, for them to choose him. I didn't give him the job. It was up to the company to see if they wanted to give him the job.

Q. Isn't it true that you and Mr. West had an argument or misunderstanding because of this suit that he filed?

A. About a year after I had put him to work or sent him down to be hired at Atlantic Port Contractors I had come in contact with him and I told him about how wrong he was and the wrong that he was doing to our people who are employed in the Port of Philadelphia, where our companies have been put out of business in the past, because of these claims, where they couldn't get insurance for their operations.

Q. And you told him at that time that if you had anything to do with it he wouldn't collect a penny; is that correct?

A. Positively, because I knew the truth.

I told him at that time, if I have anything to do with it, because I knew—

Mr. Weiner: Mr. Loughney, there are no questions outstanding at the moment.

By Mr. Davis:

Q. Mr. Breithaupt, what is your occupation and address?

A. I am assistant plant superintendent of Guilbert, Incorporated, at 1105 Frankford Avenue, Philadelphia.

Q. Did Mr. Edgar Allen West make application for employment with Guilbert, Incorporated, in July, 1953?

A. Yes, he did.

[fol. 96] (Application for employment, N. R. Guilbert, Inc., Philadelphia, was marked Exhibit U. S. 10 for identification.)

Mr. Breithaupt, I hand you what has been marked as U. S. 10 for identification and ask you if this is the application for employment which was executed by Mr. West.

A. Yes, it is.

Q. Did Mr. West make any mention of any prior injury to his left knee?

A. No.

Q. The answer is no?

A. That's right.

Q. Was Mr. West employed?

A. Not according to this.

Q. Was Mr. West employed by Guilbert?

A. Yes, he was.

Q. How long did Mr. West work for Guilbert, Incorporated?

A. Until November, 1953.

Q. Until November, 1953?

A. Yes.

(Earning record of Mr. West when employed by Guilbert, Incorporated, was marked Exhibit U. S. 11 for identification.)

Q. I hand you a document which for identification purposes has been marked as U. S. 11. I ask you if that is the earning record of Mr. West when employed by Guilbert, Incorporated.

A. Yes, it is.

Q. According to that record, how much did Mr. West earn during that period of employment?

A. $75 a week.

Q. Does it reflect his total earnings?

A. Yes, his total earnings for that period were $1401.

Q. Do your records reflect that there was any time lost due to illness?

[fol. 97] A. No.

Q. Mr. Breithaupt, did Mr. West work under your supervision?

A. No, he did not.

Q. Do you know the reason for the termination of his employment?

A. Yes.

Q. State that reason.

A. Mr. West was relieved of his responsibilities at Guilbert because it was our opinion that he was not fulfilling his work satisfactorily.

Q. Are you sure that it was not due to any physical limitations?

A. Yes, I am.

. . . . . .

Mr. Davis: Your Honor, I would like to move to introduce into evidence as U. S. Exhibit 10 Mr. West's application for employment with Guilbert, Inc., and as U. S. Exhibit 11 his record of employment while so employed by that corporation.

The Court: All right.

(Exhibits U. S. 10 and U. S. 11 admitted into evidence.)

. . . . . .

By Mr. Weiner:

. . . . . .

Q. Mr. Breithaupt, you say you were at that time the assistant plant superintendent of Guilbert, Inc.; is that correct?

A. That's right.

Q. You now hold the same job?

A. Yes, sir.

Q. In what capacity was Mr. West hired?

A. As inspector.

[fol. 98] Q. Inspector of what, sir?

A. Of most of our products. Principally freight elevator doors.

. . . . . .

By Mr. Edwards:

. . . . . .

Q. Directing your attention to on or about the middle of November of 1951, by whom were you employed?

A. By Atlantic Port.

Q. And what was your job?

A. As a leading man.

Q. What does that mean?

A. Foreman.

Q. Do you know Mr. Edgar Allen West?

A. I do.

Q. Where were you working on or about that time for Atlantic Port in November of 1951?

A. At Pier 9.

Q. On any ship?

A. On the "Mary Austin."

Q. Did you see West aboard there?

A. I did.

Q. Will you tell us about when you first saw him.

A. Well, when he first got a job in Atlantic Port my supervisor come to me and he says, "Take care of this man. He has got a bad knee." He says, "See if you can get him a job somewhere where he don't have to climb."

Q. Did he indicate which knee it was?

A. I think he said it was the left knee that was bothering him.

Q. What did you do then?

[fol. 99] A. So in return I sent him over to the foreman which was in charge of the boilers and told him about it, and he says, "All right, we can give him a job on the bottom of the engine room where he don't have to climb." It was taking valves off and stripping pumps and work of that kind so he wouldn't have to climb.

Q. Did Mr. West ever make any statement to you about his knee, that you know of?

A. No, I don't recall that.

. . . . . .

Q. Did he say anything with respect to his physical condition?

A. He did make a remark or something about "I have a bum knee." That's the only thing that the man did say.

. . . . . .

By Mr. Weiner:

. . . . . .

Q. You mentioned that a supervisor came to you and said to give West an easy job. Who was that?

A. I didn't say easy. I says some place where he don't have to climb.

Q. Oh, you didn't say "easy." I am sorry. In other words, give him a job somewhere where he didn't have to climb?

A. That's right.

Q. Who was it that asked you to give Mr. West such a job?

A. Mr. Kirchoff. That is my supervisor.

Q. When was that?

A. That's when Mr. West was first hired.

. . . . . .

[fol. 100] By Mr. Davis:

. . . . . .

Q. In November of 1951 whom did you work for?

A. I worked for Atlantic Port Contractors.

Q. What was your position?

A. My position was a shop steward of that shop and a rigger.

Q. Would you explain what a shop steward is.

A. I take matters up with the Union, helping the Union out, see that everything—

The Court: Keep your voice up.

The Witness: I help the Union out. I do all Union work and see that all the members are doing their right jobs and that everything is running to Union Moyle.

The Court: You are the complaint department?

The Witness: That's right, sir.

By Mr. Davis:

Q. Were you acquainted with a Mr. Edgar Allen West in November of 1951?

A. Yes, sir.

Q. Were you acquainted with Mr. West prior to November 21, 1951?

A. Yes, sir.

Q. Do you have any personal knowledge of Mr. West's physical condition prior to November 21, 1951?

A. Well, his condition looked pretty good to me prior to November 21.

Q. Did you ever observe him limping?

A. Well, I would say that he was sort of a—I wouldn't say too healthy of a record.

Q. I can't hear you.

A. I say that he wasn't too much of a healthy worker. I mean doing manual, hard labor work.

[fol. 101] Q. I said did you ever observe him limping?

A. Oh, yes.

Q. Before the accident?

A. Before? No, I did not.

Q. Mr. Jaworski, do you often go under a nickname of Turk?

A. I do, sir.

Q. Did you submit a report to Atlantic Port Contractors Inc., with respect to Mr. West's physical condition prior to November 21, 1951?

A. No, I did not. I don't think so. I don't think so, no.

Mr. Weiner: If Your Honor please, I will object to any confrontation of a man's own witness by any prior statement or any alleged prior statement.

The Court: I will overrule the objection. If he has made a prior one, his answer is a qualified answer. He presently has no recollection of making such a statement. That is all he has said. Now, if there is something which may implement his recollection, I certainly will not prevent anyone from using it.

By Mr. Davis:

Q. Is that your signature, Mr. Jaworski?

A. Yes.

The Court: Is that paper dated?

Mr. Davis: Your Honor, this is not dated.

By Mr. Davis:

Q. Mr. Jaworski, would you read this and see if it refreshes your recollection.

A. Yes, it does.

Q. It does refresh your recollection?

A. It does, sir.

Q. Now that your recollection has been refreshed, did you submit a report as to Mr. West's physical condition prior to November 21, 1951?

A. Well, yes, I did.

[fol. 102] Q. What was the content of your report? What was the substance of it?

A. As I seen him walking in Pier 9 looking for a job, I seen him limping, and I asked him what was wrong with him, and he told me that he had an old injury sustained some time ago and it comes back on him now and then and goes away; so I told him, if he wants to go to work, let him go on board ship and either Bob Kirchoff or Mr. Winters will put him to work if they see fit.

Q. Did you make any request with respect to the type of work to be assigned to Mr. West?

A. No, I did not, sir.

Mr. Davis: No further questions.

By the Court:

Q. Do you mean to say that you made a written report to the company of that?

A. Yes. Well, you see, Mr. Van Diepen is his personnel, they says if anybody is not well and is hurt, that all matter should be taken up with the company before anybody is hired, so I went and I told him to go and see Mr. Winters or Mr. Kirchoff, because they were supervisors on the job.

Q. I understood your testimony very clearly on that. What I am talking about is, if you made a written report to the company, where is that report?

A. Well, there it is right there.

Mr. Davis: Your Honor, I am going to offer it in evidence.

The Court: Not the thing that you showed him but something else, is that it?

Mr. Davis: This is the report he made to the company and which was produced this morning by Mr. Van Diepen when he was called as a witness.

The Court: All right.

Mr. Davis: Your Honor, this has already been marked as U. S. 3. I would like to offer it into evidence.

[fol. 103] The Court: Well, let the man see it. Let the witness see it. See if he can identify it.

By Mr. Davis:

Q. Can you identify it?
A. That's it.
Q. That is your report?
A. That is my report.

By the Court:

Q. Did you sign it?
A. Yes, sir.

Mr. Weiner: That is dated before the accident, before November, 1951.

The Witness: Yes, before November 21, 1951.

The Court: Isn't this a bit of a double-edged sword as far as the respondent is concerned, this type of evidence?

Mr. Davis: I don't know how it is. The man testified a minute ago that he submitted it after November 21, 1951—

. . . . . .

By Mr. Weiner:

Q. Mr. Jaworski, let me show you this Exhibit U. S. 3 again. That was typed up before it was signed by you, wasn't it?

A. Yes.

Q. You made it up?

A. I think it was Mr. Herdelin or Mr. Handler.

Q. It was made up before November, 1951; is that correct?

A. Yes.

Q. And signed by you before November, 1951?

A. What do you mean, before November, 1951.

Q. I am asking you.

A. Well, I am asking you a question.

Mr. Davis: Your Honor, I object. The witness has already testified.

[fol. 104] The Court: This is cross-examination, Mr. Davis. It hasn't even approached the limits of impropriety. Go ahead.

By Mr. Weiner:

Q. Was that report made out and signed by you before November of 1951?

A. No.

Q. When was it made out?

A. In November.

Q. When in November?

A. I can't tell you right off what date in November.

Q. Was it in the beginning of November?

A. Sometime in the beginning of November, yes, the first or maybe the second week in November.

Q. The first or second week in November?

A. I cannot recollect.

Q. To your present recollection that is accurate; is that correct?

A. That's right.

* * * * * * *

By Mr. Davis:

Q. Mr. Lowe, what is your occupation and present address?

A. Deputy commissioner, Bureau of Employees Compensation Commission, U.S. Department of Labor, 807 Lafayette Building, Philadelphia.

Q. Mr. Lowe, pursuant to a subpoena from the Government, have certain Employees Compensation records in your New York office been transferred to the Philadelphia office?

A. They were.

Q. Those records relate to an accident involving Eugene Albert West?

A. The title here is Edward A. West.

Q. Relating to an Edgar A. West.

[fol. 105] A. Edward.

Q. Edward?

A. That is correct, Edward A. West.

Q. Do they reflect his Social Security number?

. . . . . .

Q. Is there a report of accident in those records, Mr. Lowe?

A. Yes.

Q. May I examine it?

A. Yes (handing).

Q. What is the date of that report of accident?

A. The date that the claim was made out was January 28, 1953.

Q. Whom is it signed by?

A. Edward A. West.

Q. How does it describe the injury? What injuries does it say that the man sustained?

A. "Hurt my back and side."

Q. How does he say he he sustained those injuries?

A. Defective scaffold. Slipped and fell ten feet.

(Document from the file of Employees Compensation Commission was marked Exhibit U. S. 12 for identification.)

By the Court:

Q. Does your file indicate whether he was represented by counsel?

A. He was represented by not an attorney, sir, but by Mr. Irving B. Stern, who is a licensed compensation representative in the State of New York.

Q. In other words, he had professional assistance?

A. Yes, sir.

(Report of accident from the file of the Employees Compensation Commission was marked Exhibit U. S. 13 for identification.)

[fol. 106] By Mr. Davis:

Q. I show you a report of accident marked U. S. 13 for identification. Whom was that report submitted by, Mr. Lowe?

A. That report was filed by the insurance carrier for the employer in whose service the plaintiff, Edward West, claimed to have been injured.

Q. The employer was who?

A. Todd Shipyards Corporation.

Q. Does it describe the injury?

A. It describes what he states was the injury and the manner in which it occurred.

Q. Would you give us that, please.

A. The statement is in quotation marks: "I was climbing up on a scaffold and the scaffold slipped and I fell, hitting my chest and back, and there was water on the deck and I get a chill."

(Letter addressed to the Bureau of Employees Compensation Commission from Irving B. Stern was marked Exhibit U. S. 14 for identification.)

By Mr. Davis:

Q. I hand you a document that has been marked U. S. 14 for identification. What does that document consist of, Mr. Lowe?

A. It is a letter addressed to the Bureau of Employees Compensation Commission in New York City, from Mr. Irving B. Stern, 170 Broadway, in which he—

Q. Who is Mr. Stern?

A. Mr. Stern is the duly licensed representative in the State of New York of compensation claimants and the representative of this plaintiff.

Q. Would you give the contents of that letter.

[fol. 107] A. It is very brief. He says:

"Gentlemen:

"I wish to acknowledge receipt of your letter dated July 1, 1954. I would appreciate it if you would hold this claim in abeyance until you hear from me."

Q. Mr. Lowe, other than the communication from the United States Attorney to have the file sent to Philadelphia, are there any other papers. Is that the last document filed in that file?

A. That is the last paper in the file.

EXCERPTS FROM ANSWERS TO INTERROGATORIES

I should also like to read into the record certain admissions made on answers to interrogatories by the respondent United States of America. From the supplemental and amended answers to interrogatories filed on behalf of the Government on July 1, 1953, sir, I read as follows:

> "Answer to interrogatory No. 4 is amended to read as follows:
>
> "The SS Mary Austin arrived at Philadelphia, Pennsylvania, at approximately 11:00 A.M. on November 5, 1951. The vessel left Pier 3, Sun Shipyards, Chester, Pennsylvania, in tow. At 2:35 P.M. on November 5, 1951, the vessel was secured portside to North Side Pier 5 N, Philadelphia. On November 6, 1951, Atlantic Port Contractors, Inc. boarded the vessel for the performance of the repair contract. On November 7, 1951, at 1:30 P.M. the vessel was shifted to South Side Pier 9-N starboard side to pier, where the vessel remained until completion of the repair work. On December 12, 1951, at 12:30 P.M., the vessel sailed from Pier 9 under her own power."

[fol. 108] Further from the same sheet, sir, in answer to interrogatory No. 5, I should like to read first from the original answer, sir, and then the supplemental answer to the same interrogatory. From the original answer to interrogatory No. 5 filed by the Government:

> "On November 21, 1951, the SS Mary Austin was husbanded by United States Lines under a General Agency Agreement. The respondent is endeavoring to find out whether or not any representatives of United States Lines were on board the vessel on November 21, 1951, and if so their names and duties. If such information is obtained it will be furnished to you in the Supplemental Answer."

Now, the supplemental answer to the same interrogatory ready as follows:

> "The only employee of United States Lines aboard the vessel was Mr. T. Cameron, Inspection Engineer, c/o Superintendent of Engineers, Pier 62, N. Y. Respondent does not know whether or not Mr. Cameron was aboard the vessel on November 21, 1951."

Further in answer to interrogatory No. 6, again in the supplemental answers, the following:

> "The members of the crew of the SS Mary Austin were Master T. G. Karso, 56 Goble, Newark, New Jersey; Chief Officer A. A. Haus, 95 Beeckman Avenue, Tarrytown, New York; Second Officer Jerome L. Greenberg, 1904 South 36th Street, Omaha, Nebraska; Chief Engineer Arthur O'Connor, 42 Conyingham Avenue, Randall Manor, Staten Island, New York; First Engineer Charles Booth, 620 Gaul Street, Philadelphia, Pennsylvania; Chief Steward Jose Salguero, 1017 Intervale Avenue, Bronx, New York."

[fol. 109] Also in answer to interrogatory No. 7 from the supplemental answers to interrogatories:

> "Between the dates of October 22, 1951 and November 5, 1951, a survey was conducted by Mr. Fred Wentz and Mr. Thomas Cameron, c/o Superintendent of Engineers, Pier 62, North River, New York, New York. The purpose of this survey was for the preparation of the specifications to be included in the repair contract, which contract was later performed by Atlantic Port Contractors, Inc. Mr. Cameron was an employee of United States Lines. The last known address for Mr. Wentz was Costa's Trailer Court, Route 6, Lodi, N. J. The American Bureau of Shipping, 45 Broad Street, New York 4, N. Y. held Contract No. MAI-817 (Worksmalrep) requiring it to make an inspection for the purpose of determining whether or not the vessel was in class after performance of the reactivation repair contract."

Excerpts From Log Book

Mr. Weiner: If Your Honor please, you will recall yesterday I was given leave to read into the record certain entries from the logbook of the "Mary Austin." I should therefore like to read in from the smooth log of the S.S. "Mary Austin," which has been produced for us by the U. S. Attorney's Office, the entries for the 21st day of November, 1951.

0000—Midnight, S. Bender N/M, standing for night mate, on duty, gangway watch maintained.

0400—Clear and cold, frequent inspections. Deck winches checked O. K.

0800—Clear and cold, routine inspections. All in order. N/M Bender relieved by chief officer.

0800-1200—Partly cloudy—routine inspections.

0800—Repair gangs resume various repairs about vessel as per specifications.

[fol. 110] 1200—All work ceases for mean.

And those entries are signed J. L. Greenberg 2/0, standing for second officer.

Offers in Evidence

Mr. Hoft: May I hand up the employee record, and may I supplement that with the separate timecards when the company sends them up? They are on the way, Your Honor.

Mr. Weiner: May they be offered as part of my case?

The Court: They may be. I say it is still very sketchy on your damages. This man certainly had to have a record of yearly earnings, and it hasn't been demonstrated.

(Document headed "Employee Record" was marked Exhibit L-8 and received in evidence.)

(Group of timecards referred to by Mr. Hoft was subsequently received and added to Exhibit L-8.)

Mr. Davis: If Your Honor please, may I have the opportunity to correct the record on a matter that came to my attention last night. Yesterday Mr. Weiner read into the record the United States supplemental and amended interrogatories, and in answer to interrogatory No. 7, it was

supplemented by saying, "Between the dates of October 22, 1951, and November 5, 1951, a survey was conducted by Mr. Fred Wentz and Mr. Thomas Cameron . . ."

Mr. Cameron informs me that that survey was conducted by Mr. Roy Block of the Maritime Administration, and Mr. Leo Van Damme of United States Lines. This was the information reflected in the answer to interrogatories as furnished to me. He has shown me from their record that it was incorrect.

The Court: In other words, you are substituting two names for those that you previously had?

Mr. Davis: Yes, sir.

The Court: A survey was, however, made by the United States Lines and the Maritime Commission?

Mr. Davis: Yes, sir, Your Honor.

[fol. 111] The Court: All right. I think that is all you want to prove anyway, isn't it, Mr. Weiner?

Mr. Weiner: What is that, sir?

The Court: You only wanted to prove that a survey was made?

Mr. Weiner: That is right, sir.

* * * * * * *

(Photostatic copy of extracts from the logbook of the S. S. "Mary Austin" was marked Exhibit U. S. 15 for identification.)

Mr. Davis: Your Honor, I would like to offer into evidence the logbook of the S. S. "Mary Austin" for the period in question, and since that is a permanent Government record that has to be returned to Hoboken, New Jersey, I have photostated what I consider the pertinent pages, and counsel for both sides stipulate that it should go in.

The Court: Very well; you may withdraw the original and substitute the photostat.

(Exhibit U. S. 15 admitted in evidence.)

* * * * * * *

Mr. Davis: If Your Honor please, it is not clear as to whether I have offered Mr. West's income tax return for

1951 into evidence. I would like to move to have it introduced into evidence.

The Court: It will be admitted.

(Exhibit U. S. 1 admitted into evidence.)

[fol. 112]

IMPLEADING PETITION AGAINST ATLANTIC PORT CONTRACTORS, INC. UNDER ADMIRALTY RULE 56

To the Honorable,

The Judges of the Said Court:

The petition of the United States of America, respondent in the above-entitled cause, respectfully shows:

First: Libelant, Edgar Allen West, has filed against respondent, United States of America, a libel, a copy of which is attached marked "Exhibit 1".

Second: Respondent-impleaded, Atlantic Port Contractors, Inc., was at all times material to these proceedings, and now is a corporation organized and existing under the laws of Pennsylvania with its office and place of business at 103-109 Cuthbert Street, Philadelphia, Pennsylvania, within this district.

Third: At all times material to these proceedings, respondent-impleaded, Atlantic Port Contractors, Inc., was engaged *inter alia* in the business and profession of repairs, completion, addition, alteration work and services on seagoing vessels.

Fourth: On or about February 5, 1951, respondent-impleaded, Atlantic Port Contractors, Inc., and petitioner-respondent, United States, entered into a contract, designated Contract No. M.A-2, a copy of which is in respondent-impleaded's possession, and a certified copy of which will be presented at the trial. Thereafter, and on the basis of competitive bids, the respondent-impleaded, Atlantic Port Contractors, Inc., was awarded and accepted Job Order No. 22, together with specifications, copies of which are in respondent-impleaded's possession, and certified copies of

which will be presented at the trial. Job Order No. 22 with the Specifications was entered into under the provisions of Contract No. MA-2, between respondent-impleaded and petitioner-respondent for the performance of repairs, completion, addition, alteration work and or services upon the SS Mary Austin.

[fol. 113] Fifth: At all times during the performance of its work under said agreement and at the time of the accident or event in the libel alleged, custody and control of all pertinent parts of the SS Mary Austin had been delivered by the petitioner-respondent to the respondent-impleaded, its agents, servants and employees, and at the time of the delivery aforesaid, the vessel was in a safe and seaworthy condition for the use of the employees of the respondent-impleaded for the purpose of performing the work which the respondent-impleaded undertook and agreed to perform.

Sixth: By the terms of the agreement relating to said work on board the SS Mary Austin, at the time and place mentioned, it was the duty of the respondent-impleaded its agents, servants and employees, to act with due and professional care during its performance of the work while the SS Mary Austin, and/or certain parts thereof, were in its possession and control and to that end to correct and prevent any and all dangerous conditions, if any there might be, in the necessary work places on board the SS Mary Austin, and to warn and supervise its employees of any dangers which might arise and to take steps promptly to correct and eliminate such dangerous conditions, if any, which might or could reasonably be ascertained and discovered by the exercise of due care and inspection, or be created during the course of its performance of its work.

Seventh: Petitioner-respondent, United States, avers that the accident and occurrence in the libel alleged was not due to any negligence on the part of the petitioner-respondent, United States, its agents, servants or employees, or to any unseaworthiness of the vessel but avers that the said accident or occurrence complained of in the libel was solely or in major part due to the fault or negli-

gence of the respondent-impleaded, its agents, servants and employees, in the performance of the agreed work, in the following respects, to wit:

(a) in that the work was performed by incompetent persons;

[fol. 114] (b) the supervision of the work on this particular job was incompetent in that;

(1) the supervisor and the libelant were careless and negligent in that, well-knowing that under the specifications of the agreement, they were to perform certain repair work on the feed lines and knowing this, they failed to take reasonable steps to discover the danger and to correct and prevent any dangerous conditions.

(c) in other respects to be shown upon the trial.

Eighth: By reason of the aforesaid fault and negligence, respondent-impleaded, its agents, servants and employees, in breach of its agreement with petitioner-respondent to perform in a proper, professional and workmanlike manner the work which it agreed to perform on said vessel, respondent-impleaded is liable to petitioner-respondent by way of indemnity or liability-over or otherwise in whole or in part for any and all sums for which petitioner-respondent may be found to be liable to the libelant in the present action.

Ninth: That pursuant to said Contract No. MA-2, between the United States of America and respondent-impleaded, Atlantic Port Contractors, Inc., under Article 12(2), the respondent-impleaded, Atlantic Port Contractors, Inc., expressly agreed to hold the petitioner-respondent, United States, harmless for bodily injury to or death of persons occasioned either in whole or in part by the negligence or fault of respondent-impleaded, Atlantic Port Contractors, its officers, agents or employees, in the performance of work under said contract.

Tenth: The alleged injuries to the libelant arose or grew out of the performance by respondent-impleaded, Atlantic Port Contractors, Inc., of the contract.

Eleventh: That on November 21, 1951, the date the libelant alleges his injuries were sustained, the SS Mary Austin was still in the possession of the respondent-impleaded, and it engaged in carrying out the aforesaid contract.

Twelfth: If libelant suffered any damages and is entitled [fol. 115] to any recovery against respondent-petitioner, United States, by reason of the matters alleged in the libel, which respondent-petitioner denies, it is because of the fault or negligence, in whole or in part, of the respondent-impleaded, Atlantic Port Contractors, Inc., its agents, servants and employees, in failing carefully to perform the obligations and duties resting upon it in carrying out its repair work, and if the libelant should recover any judgment against petitioner-respondent, the petitioner-respondent, United States should be entitled to indemnify to the full extent of such judgment or decree from the respondent-impleaded, Atlantic Port Contractors, Inc.

Thirteenth: That all and singular, in the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, petitioner prays that citation may duly issue, citing respondent-impleaded, Atlantic Port Contractors, Inc., to appear and answer, under oath, to the libel and to the petition herein, and that the libel be dismissed as against the petitioner-respondent, United States, with costs, or, in the event that a decree is recovered against petitioner-respondent, that it have judgment-over against said respondent-impleaded, and that petitioner-respondent have such other and further and different relief as to the Court may seem just and proper.

/s/ Gerald A. Gleeson, United States Attorney.

Atlantic's Answer to Libel

The Answer of Atlantic Port Contractors, Inc., Respondent-Impleaded to Libel in Personam shows as follows:

1. Respondent-Impleaded is advised by counsel, believes and avers that it is not required to answer paragraph 1

since the United States of America has filed appropriate Answer thereto. Further, Respondent-Impleaded denies knowledge or information sufficient to form a belief as to paragraph 1 and asks strict proof thereof if material.

2. Respondent-Impleaded is advised by counsel, believes and avers that it is not required to answer paragraph 2 [fol. 116] since the United States of America has filed appropriate Answer thereto. Further, Respondent-Impleaded denies knowledge or information sufficient to form a belief as to paragraph 2 and asks strict proof thereof if material.

3. Respondent-Impleaded is advised by counsel, believes and avers that it is not required to answer paragraph 3 since the United States of America has filed appropriate Answer thereto. Further, Respondent-Impleaded denies knowledge or information sufficient to form a belief as to paragraph 3 and asks strict proof thereof if material.

4. Respondent-Impleaded admits that on November 21, 1951, Libelant was in the employ of Respondent-Impleaded in the capacity of mechanist.

5. Respondent-Impleaded is advised by counsel, believes and avers that it is not required to answer paragraph 5 since the United States of America has filed appropriate Answer thereto. Further, Respondent-Impleaded denies knowledge or information sufficient to form a belief as to paragraph 5 and asks strict proof thereof if material.

6. Admitted.

7. Respondent-Impleaded is advised by counsel, believes and avers that it is not required to answer paragraph 7 since the United States of America has filed appropriate Answer thereto. Further, Respondent-Impleaded denies knowledge or information sufficient to form a belief as to paragraph 7 and asks strict proof thereof, if material.

8. Respondent-Impleaded is advised by counsel, believes and avers that it is not required to answer paragraph 8 since the United States of America has filed appropriate Answer thereto. Further, Responded- (sic) Impleaded de-

nies knowledge or information sufficient to form a belief as to paragraph 8 and asks strict proof thereof if material.

9. Respondent-Impleaded is advised by counsel, believes and avers that it is not required to answer paragraph 9 since the United States of America has filed appropriate Answer thereto. Further, Respondent-Impleaded denies knowledge or information sufficient to form a belief as to paragraph 9 and asks strict proof thereof if material.

[fol. 117] 10. Respondent Impleaded denies knowledge or information sufficient to form a belief as to allegation contained in paragraph 10 and demands proof thereof if material.

11. Respondent-Impleaded is advised by counsel, believes and avers that it is not required to answer paragraph 11 since the United States of America has filed appropriate Answer thereto. Further, Respondent-Impleaded denies knowledge or information sufficient to form a belief as to paragraph 11 and asks strict proof thereof if material.

Wherefore, Respondent-Impleaded prays that the libel be dismissed with Costs.

(S.) J. B. H. Carter and George F. Shinehouse, Jr.,
Proctors for Respondent Impleaded.

Commonwealth of Pennsylvania,
County of Philadelphia, ss:

J. V. Diepen being duly sworn according to law, deposes and says that he is President of Atlantic Port Contractors, Inc. and as such officer he is authorized to and does make affidavit in behalf of Atlantic Port Contractors, Inc.; that the facts herein set forth are true and correct to the best of his knowledge, information and belief.

(S.) J. V. Diepen.

Sworn to and Subscribed before me this 23rd day of March, 1953.

(S.) Michael A. Usewicz, Notary Public.

(Seal)

My Commission Expires Jan. 26, 1957.

[fol. 118]

ANSWER OF ATLANTIC PORT CONTRACTORS, INC. RESPONDENT IMPLEADED TO PETITION UNDER 56TH RULE IN ADMIRALTY

The Answer of Atlantic Port Contractors, Inc., of Respondent-Impleaded to Petition under 56th Rule in Admiralty shows as follows:

1. Admitted.

2. Admitted.

3. Admitted.

4. Admitted.

5. The Respondent Impleaded admits that the pertinent parts of SS Mary Austin had been delivered to Respondent-Impleaded. Respondent-Impleaded denies knowledge sufficient to form a belief as to remaining allegations of paragraph 5, same are denied, and Respondent-Impleaded asks strict proof thereof.

6. The Respondent Impleaded is advised by counsel, believes and avers that paragraph 6 pleads a conclusion of law and that the Respondent Impleaded is not required to answer paragraph 6th as the terms of the agreement speak for themselves.

7. Respondent-Impleaded denies each and every allegation in paragraph 7 including in particular, sub-paragraphs a, b (1) and c.

8. Respondent Impleaded denies paragraph 8th and is further advised by counsel, believes and avers that paragraph 8th pleads a conclusion of law and Respondent-Impleaded is not required to answer further than denial.

9. In answer to paragraph 9th, Respondent-Impleaded is advised by counsel, believes and avers that it is not required to answer this paragraph as it avers a conclusion of law and further Respondent-Impleaded answers that the Contract so pleaded, speaks for itself.

10. Respondent-Impleaded admits that if the injuries occurred as alleged, the libelant was engaged in the per-

formance of work in furtherance of the Contract between Respondent and Respondent-Impleaded.

11. Respondent-Impleaded admits that on November 21, 1951, it was engaged in work in furtherance of a Contract [fol. 119] between Respondent and Respondent-Impleaded and that Respondent-Impleaded was in possession of the SS Mary Austin and engaged in carrying out the aforesaid Contract.

12. Respondent-Impleaded denies paragraph 12, is advised by counsel, believes and avers that it is not required further to answer as paragraph 12 avers conclusions of law.

13. Admitted.

Further Answering the Petition and as a First Separate and Distinct Defense Thereto, Respondent-Impleaded Alleges, Upon Information and Belief:

14. That the Petition under 56th Rule In Admiralty fails to state a claim against Respondent-Impleaded upon which relief can be granted, more particularly, since there is no right of contribution against Respondent-Impleaded in the event that the Respondent should be held liable to Claimant.

Wherefore, Respondent-Impleaded prays that the Petition under 56th Rule in Admiralty be dismissed with costs.

(S.) J. B. H. Carter, (S.) George F. Shinehouse, Jr.,
Proctors for Respondent-Impleaded.

[fol. 120] Commonwealth of Pennsylvania,
County of Philadelphia, ss:

J. V. Diepen, being duly sworn according to law deposes and says that he is President of Atlantic Port Contractors, Inc. and as such officer he is authorized to and does make affidavit in behalf of Atlantic Port Contractors, Inc.; that the facts herein set forth are true and correct to the best of his knowledge, information and belief.

(S.) J. V. Diepen, President.

Sworn to and subscribed before me this 23rd day of March, 1953.

(S.) Michael A. Usewicz, Notary Public.

(Seal)

My Commission Expires Jan. 26, 1957.

* * * * * *

[fol. 29]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Appellant's Supplemental Appendix

OPINION OF COURT OF APPEALS—Filed July 25, 1957

By Goodrich, Circuit Judge.

Edgar Allen West instituted an action to recover against the United States for injuries sustained on November 21, 1951, on board the S. S. Mary Austin owned by the respondent, United States. West was employed by Atlantic Port Contractors, Inc. This firm was engaged to rehabilitate and recondition the Mary Austin, a liberty ship, which had been part of the "mothball fleet" of deactivated vessels. The ship was towed to Philadelphia and work was in progress on the various jobs of repair at the time West was injured.

The injuries were sustained while West was working inside the low pressure cylinder of the main engine of the ship. He received a blow on the knee from a falling pipe plug.

Most of the legal questions in the case were throughly (sic) considered in an opinion written by the learned trial judge which appears in 143 F. Supp. 473 (E.D. Pa. 1956). They include the question whether this ship was sufficiently in navigation so that the maritime law rules apply. They include also the question of whether a man engaged in doing a rehabilitation job on a vessel can recover for injuries sustained by reason of a defect which the rehabilitation presumably would have remedied.

In spite of the interesting questions thus presented we are unable to review the answers given. The reason is that

we do not know the cause of this accident. In finding of fact number 8 this question is dealt with. The best way to present what is troubling us is to quote from this finding.

> [fol. 30] "At the time [of the accident] libellant believed that the plug, which weighed about a quarter of a pound, had been dropped by one of his fellow workers while working above him in the engine room and, although he now denies it, the Court believes that at the time he accused a number of persons of having dropped the plug. The record fails to establish that any group or individual was working above libellant at the time. Although the plug was not produced at the time of trial and the explanation of its absence is not satisfactory (libellant merely claimed he could not find it), the record leaves no doubt that a plug did strike the libellant's left knee and that (1) it either fell from one of the pipes or tanks above the low pressure cylinder in which libellant was working, or (2) was dropped by an Atlantic workman. The presence of a small quantity of water on the engine room floor immediately after the accident would indicate the probability of the first conjecture." 143 F. Supp. at 476.

If the plug was accidently (sic) dropped by a fellow workman of Atlantic, that presents one set of problems. If the fellow workman intentionally dropped it then we have the question involved, perhaps, in *Boudoin* v. *Lykes Bros. S.S. Co.*, 348 U.S. 336 (1955). On the other hand, if the plug fell out of the pipe we meet the question of possible unseaworthiness and then the question of whether liability for unseaworthiness would be applicable in this case. But we cannot get into such questions on a finding which merely indicates the probability of the first conjecture which term is defined in the dictionary as an "inference from defective or presumptive evidence."

Much as we regret adding to the burden of an already overworked judge, we shall have to send the case back for more precise findings. Cf. *Poignant* v. *United States*, 225 F.2d 595 (2d Cir. 1955); *Dixon* v. *United States*, 219 F.2d 10 (2d Cir. 1955). Of course, they cannot be based on [fol. 31] absolute certainty; few things in life are. But the

problem of coming to a conclusion here is no harder than the problem which a jury has and if a libellant cannot make out on the facts a case on which recovery can be granted, necessarily the legal problems disappear.

The judgment of the district court is vacated and the case remanded for further proceedings in accordance with this opinion.

[fol. 32]

JUDGMENT OF COURT OF APPEALS IN No. 12,079—July 25, 1957

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby vacated, and the case remanded for further proceedings in accordance with the opinion of this Court.

Attest:

Ida O. Creskoff, Clerk.

July 25, 1957.

[fol. 33]

ORDER OF DISTRICT COURT AMENDING FINDINGS OF FACT

The above entitled case having been returned to this Court by mandate of the Court of Appeals for the Third Circuit for further proceedings in accordance with its opinion filed July 25, 1957, West v. United States, 246 F. 2d 443, and this Court having reviewed the record of the case, now this 8th day of October, 1957, in accordance with the said mandate, this Court enters the following

Order.

That Finding of Fact No. 8 of the opinion filed August 2, 1956, 143 F. Supp. 473, be and it is hereby amended by adding the following sentence at the end thereof:

"Therefore, the Court finds that the libellant has established by a bare preponderance of the evidence

that he was injured because of a falling plug of the type described at the beginning of this Finding of Fact No. 8, which said plug was caused to fall through the negligent acts as hereinafter set forth of Atlantic Port Contractors, Inc."

In all other respects the Findings of Fact and Conclusions of Law are Affirmed.

By The Court:

/s/ Thomas J. Clary, J.

[fol. 34]

APPELLANT'S REQUEST TO TRIAL JUDGE

October 15, 1957.

Honorable Thomas J. Clary
3074 U. S. Court House
Philadelphia, Pennsylvania

Re: Edgar Allen West v. United States and Atlantic Port Contractors

Dear Judge Clary:

Your Honor will recall that the above matter was remanded by the Court of Appeals for further findings of fact on the question of what caused the plug to fall from the upper engine room and injure the libellant.

In your order filed on October 8, 1957, your Honor modified Fact Finding No. 8 by adding "which said plug was caused to fall through the negligent acts as hereinafter set forth of Atlantic Port Contractors, Inc." Since there are no further references to this issue in the Findings of Facts, we have examined your discussion following the findings and the only portion which I find relating to the subject matter is set forth under the heading of "negligence" starting near the bottom of page 19 and concluding about half way down on page 20 of your discussion, which reads as follows:

"The S. S. 'Mary Austin' was towed to Pier 5, North, Philadelphia, on November 5, 1951. Its water

tanks and pipes were completely drained. Nothing in the condition of the vessel as it then stood could have caused the libellant's injury. It was only after something was done to alter the conditions of November 5, 1951, that made the area in which libellant worked a potentially unsafe place to work. That 'something', of course, was the placing of water, and the pressure resulting therefrom, into the pipes and tanks. This [fol. 35] was done not by the respondent but by the members of the reactivation crew, employees of Atlantic. That loosely fitted plugs might be present and not able to withstand the application of pressure is certainly not surprising. That very fact was one of the reasons that the ship was being repaired and whatever precautions should have been taken when water was first placed into the lines should have been taken by Atlantic."

I would very much appreciate your advising whether this is the section to which you refer; or, if not, would your Hon or please indicate that portion to which you had reference so that upon the appeal we can accurately quote your Honor.

In view of the fact that the time for appeal is running out, your early reply would be deeply appreciated.

Respectfully yours,

AEFamjw

cc Louis C. Bechtle, Esq., Asst. U. S. Attorney, 4042 U. S. Court House, Philadelphia 7, Penna.

Thomson E. Edwards, Esq., 20th Floor, Fidelity Philadelphia Trust Building, Philadelphia 9, Pennsylvania.

[fol. 36]

TRIAL COURT'S RESPONSE TO APPELLANT'S REQUEST

October 16, 1957.

Abraham E. Freedman, Esq.
1415 Walnut Street
Philadelphia 2, Penna.

Re: Edgar Allen West v. United States of America v. Atlantic Port Contractors, Inc. No. 119 of 1952 in Admiralty

Dear Mr. Freedman:

Receipt is acknowledged of your letter of October 15, 1957 in the above matter.

In answer thereto, the reference made in the amendment to Finding of Fact No. 8 will be found at 143 F. Supp. pages 480 and 481 under the headings "Negligence" and "Indemnity"; and at pages 19-22 of the opinion filed August 2, 1956.

Very truly yours,

Thomas J. Clary, United States District Judge.

cc: Hon. Harold K. Woogl, United States Attorney.

Thomson F. Edwards, Esq.

Carl C. Davis, Esq., Assistant Chief, Admiralty & Shipping Section, Department of Justice, Washington 25, D. C.

[fol. 37]

FINAL DECREE

And Now, to wit, this 5th day of December, 1957, in accordance with the Findings of Fact and Conclusions of Law, the Pleadings and Proof as amended by Order filed October 8, 1957, it is

Ordered, Adjudged and Decreed that judgment be entered in favor of the respondent, United States of America, and against the libellant, Edgar Allen West.

It is further Ordered, Adjudged and Decreed that the action of the respondent, United States of America, over

and against the impleaded respondent, Atlantic Port Contractors, Inc., be and it is hereby dismissed.

s/ Clary, J.

[fol. 1]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,507

EDGAR ALLEN WEST, Appellant,

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF COMMERCE, MARITIME ADMINISTRATION, Respondents,

v.

ATLANTIC PORT CONTRACTORS, INC., Impleaded Respondent

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued June 2, 1958

Before Maris, Goodrich and McLaughlin, Circuit Judges.

OPINION OF THE COURT — Filed July 2, 1958

By Goodrich, Circuit Judge.

This is an appeal from a judgment for the respondent in a personal injury case brought by the libelant against the United States as owner of a ship called "S.S. Mary [fol. 2] Austin.". The case is here for the second time. Following the first hearing, we sent it back to the district court for a further finding which has been made. 246 F.2d 443 (3d Cir. 1957). The case comes to us after a very competent discussion of its problems by the trial judge. 143 F. Supp. 473 (E.D. Pa. 1956), which has already been cited

with approval by other courts. We do not need to state more than a brief summary of the facts for the purpose of our discussion here.

The "Mary Austin," owned by the United States, was one of the ships put in "moth balls" at Norfolk, Virginia, after World War II. During the Korean conflict the decision was made to reactivate her and she was towed from Norfolk to Chester, Pennsylvania, and from Chester brought up and tied alongside a pier in Philadelphia. The contract for the work to put the ship back in service was let to a concern called Atlantic Port Contractors, Inc. This company had full charge of the work. On the day of the accident which is the source of this litigation, West, an engineer, was working in the low pressure cylinder of the ship's main engine. He was hit on the knee by a metal plug which came out of an overhead water pipe when some other employee of the contractor turned on the water without warning. The plug was evidently loose enough so that the pressure of the water forced it from the pipe. West sues for the injuries thus received.

The libelant's case is in the usual form for this type of litigation. Unseaworthiness is charged; likewise, negligence in failing to provide plaintiff with a "safe place to work." The latter can be treated first because its discussion will take a very short time. On West's behalf it is urged that the duty to provide a safe place to work is absolute and nondelegable and hence the United States, as owner of the ship, cannot escape responsibility by placing a contractor in full charge of the ship. In other words, we would have, if libelant's theory were followed, something like, and even greater than, the insurer's liability for seaworthiness which an owner fails to fulfill at his peril.

But the legal responsibility for the places in which a workman carries on activities is not an insurer's liability for safety but responsibility only for the exercise of reasonable care with regard to the premises at which work is done. It is a nondelegable duty but not an absolute one. It is

Borge v. National Bulk Carriers, Inc., 148 F. Supp. 808 (S.D.N.Y. 1957), *aff'd.* 254 F.2d 717 (2d Cir. 1958); Raidy v. United States, 153 F. Supp. 777 (D. Md. 1957), *aff'd.* 252 F.2d 117 (4th Cir. 1958), *cert. denied*, 35 U.S. (1958).

rather a nondelegable obligation that reasonable care shall be used. This was pointed out with clarity by this Court in *Barbazon v. Belships Co.*, 202 F.2d 904 (3d Cir. 1953), and reiterated by us in *Osmocity v. United States*, 204 F.2d 654 (3d Cir. 1953).

So far as these premises were concerned there was no lack of safety. Even if the plug was loose that did no harm to West or anyone else. The accident to West came because a fellow employee of the contractor did a positive and negligent act. For such superadded, affirmative conduct, the owner of the premises is not responsible. See 2 Restatement, Torts § 426 (1934).

We come then to the problem of seaworthiness. Here is a responsibility not discharged by the exercise of reasonable care. *Mahnich v. Southern Steamship Co.*, 321 U.S. 96 (1944). In *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), this protection was extended to a stevedore who was doing seamen's work.

We do not think that the "Mary Austin" at the time of this accident was a ship in navigation nor do we think that the work which West was doing was seamen's work so that the warranty of seaworthiness ran to him.

Counsel for the libelant insists that anything floating on the water is in navigation although he concedes that an uncompleted vessel just launched is not in navigation. See [fol. 4] *Franke v. Bethlehem Fairfield Shipyard, Inc.*, 132 F.2d 634 (4th Cir. 1942). *But cf. United States v. Lindgren*, 28 F.2d 725 (4th Cir. 1928).

The closest ruling authority is *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187 (1952). There sightseeing boats had been hauled up on the shore for the winter layoff. The Court held that the warranty of seaworthiness did not extend to the libelant's decedent who was fatally injured while engaged in painting and repairing these vessels in preparation for their seasonal launching. We do not find in the Court's discussion in that case any such rule of thumb test as contended for by the appellant. We think the reason

* At least the theory was that he was doing seamen's work although it is now asserted that the premise is incorrect. See Tetreault, *Seamen, Seaworthiness, and the Rights of Harbor Workers*, 39 Cornell L. Q. 381, 413-14 (1954).

which controls here is that the vessel was out of service as a ship fully and as completely as a vessel which has just been launched but which is not yet ready for service as a ship. See *Harris* v. *Whiteman*, 243 F.2d 563 (5th Cir. 1957); *cf. Gonzales* v. *United States Shipping Bd.*, 3 F.2d 168 (E.D. N.Y. 1924). See also *Owens* v. *United States*, 1958 Am. Mar. Cas. 216 (S.D. Fla. 1957) (a case similar to ours). It is not as though the "Mary Austin" had finished a voyage and was having repair work done before resuming business again. This ship had been laid up for some time and had to be thoroughly rehabilitated before getting back to service. She had no crew, contrary to argument made by libelant. There were employees of the United States on the ship. They had signed no articles and they were there not as a ship's crew but as inspectors on behalf of the United States to see that the work was done in accordance with the contract.

The same sort of argument applies to the work which West was doing. It may be possible to say, as the Supreme Court has, that a stevedore loading or unloading a ship (*Sieracki*, *supra*), or a carpenter repairing grain-loading equipment on a ship in active navigation (*Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406 (1953)), are performing work of a maritime nature. But this libelant was a shoreside engineer who came on board to work on the rehabilitation job [fol. 5] preparatory to getting the ship back into service. That is not something which bears any resemblance to marine navigation.

Each of these cases differs from the next in some respects of course. We find *Borrahill* v. *Pacific Far East Line, Inc.*, 238 F.2d 385 (9th Cir.), *cert. denied*, 354 U.S. 938 (1957), and *Baida* v. *United States*, 252 F.2d 117 (1958), assuming and adopting the trial court's opinion reported in 153 F. Supp. 777 (D. Md. 1957), *cert. denied* 35 U.S. — (1958), helpful and very close to ours. Judge Hand puts it well in *Bova* v. *National Bulk Carriers Corp.*, 251 F.2d 717 (2d Cir. 1958), "Obviously there must be some limit, else the whole fabrication of a new ship would be included [within the *Sieracki* rule]. We can only say that the reconstruction of a ship was not traditionally the task of the crew." *Read* v. *United States*, 201 F.2d 758 (3d Cir. 1953),

is distinguishable, from the instant case at least, on the amount of work involved.

The judgment of the district court will be affirmed.

[fol. 6]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,307

EDGAR ALLEN WEST, Appellant,

vs.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF COMMERCE, MARITIME ADMINISTRATION,

vs.

ATLANTIC PORT CONTRACTORS, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: Maris, Goodrich and McLaughlin, Circuit Judges.

JUDGMENT—July 2, 1958

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

Ida O. Creskoff, Clerk.

July 2, 1958

[fol. 7] Clerk's Certificate (omitted in printing).

[fol. 8]

SUPREME COURT OF THE UNITED STATES

No. 541, October Term, 1958

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 29, 1958.

/s/ William J. Brennan, Jr., Associate Justice of the Supreme Court of the United States.

Dated this 9 day of September, 1958.

[fol. 9]

SUPREME COURT OF THE UNITED STATES

No. 541, October Term, 1958

ORDER ALLOWING CERTIORARI—Filed March 2, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted, and the case is transferred to the summary calendar. The case is set for argument immediately following No. 307.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

October Term, 1958

No. [redacted]

EDGAR ALLEN WEST,

Petitioner,

v.

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF COMMERCE,
MARITIME ADMINISTRATION

v.

ATLANTIC PORT CONTRACTORS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

ABRAHAM E. FREEDMAN,
JOSEPH WEINER,
MARVIN I. BARISH,
1415 Walnut Street,
Philadelphia 2, Pa.
Counsel for Petitioner.

International, 711 S. 50th St., Phila. 43, Pa.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1958.

No.

EDGAR ALLEN WEST,

Petitioner,

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF COMMERCE, MARITIME ADMINISTRATION

v.

ATLANTIC PORT CONTRACTORS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Edgar Allen West, respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled matter on July 2, 1958.

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania is reported at 143 F. Supp. 473 (E. D. Pa., 1956) (Appellants' Appendix 12a). The opinion of the Court of Appeals for the Third Circuit is reported at F. 2d (*infra*, p. 23).

JURISDICTION.

The judgment of the Court of Appeals was entered on July 2, 1958 (*infra*, p. 28). On September 9, 1958, Mr. Justice William J. Brennan, Jr., entered an order extending the time for filing this petition for a writ of certiorari to and including November 29, 1958. The jurisdiction of this court is invoked under 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

Where the vessel is taken out of a laid up status and after navigating under tow several hundred miles through navigable waters to a pier in navigable waters where the shipowner engaged an independent contractor to overhaul and prepare the vessel for sea:

1. Does the warranty of seaworthiness extend to the longshoremen engaged in the overhauling and preparation of the vessel for sea?

2. Is the non-delegable duty to provide a safe place to work an absolute one under the warranty of seaworthiness, or is it merely a non-delegable duty to use reasonable care?

3. Is the shipowner liable in terms of negligence under his non-delegable duty to use reasonable care, where, in the course of the overhauling of the vessel, an insecurely fitted pipe plug was precipitated out of the pipe when the water pressure was turned on by one of the repairmen, striking and injuring petitioner who was engaged in the overhaul of the vessel?

STATEMENT OF THE CASE.

Petitioner, a longshoreman engaged in the overhaul and repair of the respondents' S.S. "Mary Austin" was injured, allegedly due to the unseaworthiness of the vessel and the negligence of the respondents. This petition seeks a review of the judgment of the Court of Appeals for the Third Circuit dismissing the libel.

The facts, which are not in dispute, as found by the lower courts, disclose the following. The "Mary Austin" is a Liberty ship which had been laid up in Norfolk, Virginia, in the so-called "moth ball fleet" until the outbreak of the Korean War. In May of 1951 the Government removed the vessel from its laid up status and manned it with a crew of six men, a captain, chief mate, second mate, chief engineer, first assistant engineer and steward (App. 67b-68b). The vessel was then towed from Norfolk, Virginia, several hundred miles to the shipyard in Chester, Pennsylvania, where after an inspection and survey it was towed to Pier 5 in Philadelphia for overhauling and certain repairs. Two days later the vessel was shifted to Pier 9 in Philadelphia where the overhauling was continued to its completion. At no time was the vessel placed in drydock; the entire operation was performed while the vessel lay in navigable waters moored to the piers.

The overhauling and repairs was done by Atlantic Port Contractors, Inc., under a contract with the respondents. Petitioner was an employee of the contractor.

On November 21, 1951, while petitioner was working inside the low pressure cylinder of the main engine, he was struck suddenly by a pipe plug which had been precipitated downward from one of the overhead pipes. The court below found that the plug had been loosely fitted in its socket in an overhead pipe and was forced out when the water pressure was turned on (App. 25a).

Petitioner based his claim for recovery upon two grounds: (1) that the vessel was unseaworthy in that the

plug which had been insecurely fitted in the pipe was incapable of withstanding the water pressure; and (2) that under its non-delegable duty respondent was liable under theories of negligence because the repairmen were negligent in turning on the water pressure, and because respondent failed to warn anyone of the dangerous condition.

The trial judge found that the warranty of seaworthiness did not extend to petitioner because the nature of the work in which petitioner was engaged took him "out of the class of persons to whom the warranty of *complete* seaworthiness runs." The trial judge further related the duty to provide a safe place to work to concepts of negligence rather than the warranty of seaworthiness. In so doing, he held that the fact that the pipe plug had been insecurely fitted in the pipe did not in itself create an unsafe condition, but rather that the unsafe condition resulted only from the turning on of the water pressure by the repairmen. The trial court ruled that the duty to provide a safe place to work was non-delegable; nevertheless, it held that the shipowner could not be held responsible for the actions of the contractor in turning on the water which in turn caused the insecurely fitted pipe plug to be forced out causing petitioner's injury.

The Court of Appeals affirmed the district court. It held that the duty to provide a safe place to work was related to theories of negligence rather than the warranty of seaworthiness, and since the accident to West was occasioned by the negligence of a fellow worker, the shipowner could not be held liable despite its non-delegable duty in this respect. The court held further that the warranty of seaworthiness was not applicable to the case at bar because the "Mary Austin" was not a ship in navigation and the work in which petitioner was engaged was not seaman's work.

ARGUMENT.

First Point: The Decision of the Court Below Violates the Rule That a Vessel Under Repair in Navigable Waters Is a Vessel in Navigation and That the Warranty of Seaworthiness Extends to All Those Workers on the Vessel Engaged in Preparing Her for Sea. The Lower Courts' Decision in This Regard Conflicts With the Decision of This Court in North Pacific S.S. Co. v. Hall Bros., Etc., 249 U. S. 121; With the Decision of the Court of Appeals for the Second Circuit in Halecki v. United New York and New Jersey Sandy Hook Pilots Assn., 251 F. 2d 708 (2 Cir., 1957), cert. granted 26 L. W. 3355; With the Decision of the Fourth Circuit in United States v. Lindgren, 28 F. 2d 725, Affirmed 281 U. S. 38; and the Decision of Another Panel of the Third Circuit in the Case of Read v. U. S., 201 F. 2d 758.

A. The "Mary Austin" Was a Vessel in Navigation.

The trial judge in the case at bar held that the nature of the work performed by petitioner took him "out of the class of persons to whom the warranty of complete seaworthiness runs." It would thus appear that the trial judge erroneously considered the warranty to vary depending upon the type of work being performed at the moment in behalf of the vessel. This holding not only lacks support anywhere in the law, but it violates the many decisions of this court which hold that the warranty imposes an absolute duty which may not be qualified, and it applies to all those workers engaged on board the vessel in preparing her for her voyage or for sea. *Seas Shipping Company v. Sieracki*, 328 U. S. 85; *Pope and Talbot v. Hawn*, 346 U. S. 406. The Court of Appeals below went further than the trial judge and held that the warranty has no application

held that the vessel was not in navigation and that the nature of the work being performed was not such as to bring the men performing it within the scope of the warranty. Paradoxically, the court below attempted to distinguish a former decision of the same circuit, rendered by a different panel, in *Read v. United States*, 201 F. 2d 758, on the ground that the "amount" of work was different. Implicit in this distinction is the conclusion that the court otherwise agreed with the holding of the *Read* case, namely, that the vessel was in navigation while under overhauling and repairs, and that the nature of the work entitled the workers to the benefit of the warranty. The basic reasoning of the court below appears thus to be clearly erroneous on its face. A review of the authorities establishes beyond peradventure that the rule of law adopted by the court below is completely at variance with the universal rule adopted by this court and by the courts of appeals of other circuits.

The word "vessel" is defined so as to include "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation" (R. S. Sec. 3, 1 U. S. C. A. 3). The word "transportation" is not expressly or impliedly limited to the carriage of passengers or merchandise for hire. *The International*, 89 F. 484, 32 C. C. A. 258 (Pa. 1898). Thus, barges, canal boats and other nondescript craft used in transportation having no mast or sails or motive power of their own are vessels in navigation within the admiralty jurisdiction. *Ellis v. U. S.*, 206 U. S. 246; *The Dick-Keys*, Fed. Cases No. 3898; *Kate Tremaine*, Fed. Cases No. 7622; *Southwark v. Raft of Railroad Crossties*, 40 F. 596; *Saylor v. Taylor*, 77 F. 476; *McRae v. Bowers Dredging Co.*, 86 F. 344; *The Ark*, 17 F. 2d 446. The foregoing authorities squarely contradict the holding of the court below and clearly establish beyond doubt that a vessel is in navigation whether or not she has any propelling machinery of her own so long as she is manned by a crew, even though it is

only a single individual on board tending to the needs of the vessel.

The court below attempted to buttress its position by holding that the vessel had no crew, despite the fact that she was manned by a captain and five other officers. The court reached this conclusion upon the premise that no shipping articles had been signed. Here again the gross error is patently manifest. It should be noted first that shipping articles are required to be signed only where a vessel is engaged in foreign or intercoastal commerce. 46 U. S. C. A. 564. This exempts from formal shipping articles before a commissioner all those numerous vessels which operate in coastwise trade and within the lakes, rivers and harbors.

In the case at bar, when the "Mary Austin" was taken out of its laid up status in Norfolk, it was manned by a captain, chief mate, second mate, chief engineer, first assistant engineer and a cook, all of whom were attached to the vessel and whose function was to look after the vessel's interest. When the vessel was navigating the Chesapeake and Delaware Bays and the Atlantic Ocean under tow, she was no less a vessel in navigation than any of the numerous barges which daily ply the same route under tow. See *Warner v. Norton*, 321 U. S. 565. Significantly, the respondents admitted that the captain and other men aboard the vessel were "members of the crew". In Supplemental Answers to Interrogatory No. 6, the respondents stated (1086):

> "The members of the crew of the SS Mary Austin were Master T. G. Karso, 56 Goble, Newark, New Jersey; Chief Officer A. A. Haus, 95 Beeckman Avenue, Tarrytown, New York; Second Officer Jerome L. Greenberg, 1904 South 36th Street, Omaha, Nebraska; Chief Engineer Arthur O'Connor, 42 Conyingham Avenue, Randall Manor, Staten Island, New York; First Engineer Charles Booth, 620 Gaul Street, Philadelphia,

Pennsylvania; Chief Steward Jose Salguero, 1017 Intervale Ave., Bronx, New York."

The captain and other officers of the vessel kept a log book containing detailed accounts of the events taking place on board the vessel. Regular watches were stood by these crew members and so recorded in the log books. While the vessel was berthed at the pier undergoing the overhauling and repairs, special night mates were engaged for the various watches on the vessel (109b). In all respects, the captain and the five other men, as aided by other relief personnel, performed the services regularly and ordinarily performed by members of the crew. The lower court's finding that these men did not constitute the vessel's crew is directly in conflict with the established authorities and the customary practice, and finds no support in any recognized authority. It makes no difference that the one or more men who constitute the crew signed the shipping articles; it is only essential that the men be attached to the vessel and serving the vessel's interests. *Warner v. Norton, supra.*

In support of its contention that the vessel was not in navigation, the court below relied upon this court's opinion in *Desper v. Starved Rock Drydock Co.*, 342 U. S. 7, which involved a fleet of small motorboats which had been hauled upon the shore out of the water for winter lay-over. While these boats were on shore an accident occurred and killed one of the individuals engaged in painting them. This court held that these boats were not in navigation at the time because *the boats were* not afloat. This court emphasized the fact that these boats were being made ready for the summer season and that after they were placed in the water the decedent might have been given the job of operating one of them, and held "for a number of reasons the ships might not be launched or he might not operate one. To be sure he was a probable navigator in the near future, but the law does not cover probable or

expectant seamen, but seamen in being . . . The distinct nature of the work is emphasized by the fact that there was no vessel engaged in navigation at the time of the decedent's death." Thus, the basic factor which motivated this court's opinion in the *Despar* case was the fact that the vessels were laid up on shore out of the water and therefore completely out of navigation. There is no similarity whatever between that situation and the one at bar.

The error of the court below seems to have stemmed from the erroneous comparison of a vessel which is under overhauling and repairs to a vessel under construction which has not yet been launched. In *North Pacific S. S. Co. v. Hall Bros., etc.*, 249 U. S. 121, 126-127, this court distinguished between a vessel which is under construction and one which has previously been completed and thereafter is taken out of service for repair. This court on the point stated:

> "It is settled that a contract for building a ship or supplying materials for her construction is not a maritime contract . . . but the true basis for the distinction between the construction and the repair of a ship, for purposes of the admiralty jurisdiction, is to be found in the fact that the structure does not become a ship, in the legal sense, until it is completed and launched. 'A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron—an ordinary piece of personal property—as distinctly a land structure as a house, and subject to mechanics liens created by state law, enforceable in state courts. In the baptism of launching, she receives her name, and from the moment her keel touches the water she is transformed and becomes a subject of admiralty jurisdiction.' Tucker v. Alexandroff, 183 U. S. 424."

It is clearly erroneous, therefore, to say that a vessel, after having been completed and launched and then taken out of

service for repairs is out of navigation when in fact she is simply undergoing repairs in navigable waters in preparation for sea duty.

It is settled law that even where a vessel is in drydock, entirely out of service, for repairs, it is, nevertheless, construed to be in navigable waters because the drydock is considered to be part of the water rather than the land. In fact, this recognized rule was followed by another panel of the Court of Appeals below in the case of *Rogosich v. United Drydock and Repair Co.*, 67 F. 2d 377, where a vessel was taken into drydock for major repairs and one of the carpenters was injured while securing a plank to the frame of the hull. The extent of the repairs in that case were much greater than those in the instant case. The Court of Appeals for the Third Circuit held that the vessel was in navigable waters and that the injured worker had the status of a seaman, despite the fact that the injury occurred while the vessel was in drydock undergoing the repairs.

In the case at bar, the vessel remained in the water at all times with the captain and his crew in command of the vessel. At the time of the injury on November 21, 1951, the ship's equipment including the boilers, pumps and dynamos was in operation (49b), and the vessel was very close to being ready for sea. She sailed under her own power from the pier on December 12, 1951 (107b). The finding that the "Mary Austin" was not a vessel in navigation at the time of the accident violates the settled principles announced by this court and by the various courts of appeals. The authorities require the conclusion that she was a vessel in navigation and it remains to determine that those who were aboard preparing her for sea were entitled to the benefit of the warranty of seaworthiness.

B. *The Workers Engaged in Overhauling and Preparing a Vessel for Sea Are Entitled to the Benefit of the Warranty of Seaworthiness.*

"It has long been recognized that harbor workers engaged in repairing and refitting a vessel have the status of seamen, even though the vessel is taken out of service and placed in drydock for the repairs. Indeed, the Court of Appeals for the Third Circuit below recognized this doctrine long before the pronouncement of this court in *Seas Shipping Company v. Sieracki*, 328 U. S. 85. In *Rogosich v. United Drydock and Repair Co.*, 67 F. 2d 377, a vessel was taken into drydock *for major repairs*, and one of the carpenters was injured while securing a plank to the frame of the hull. Judge Thompson, speaking for the Court of Appeals for the Third Circuit, classified the harbor worker as a seaman and outlined the basis of his right to recovery as follows (p. 378):

> "The libellant, while engaged in repairing a scow *on the respondent's dry dock* upon navigable waters, had the status of a seaman. Kuhlman v. W. & A. Fletcher Co. (C. C. A.) 20 F. (2d) 465. In the absence of statute, a seaman may recover compensatory damages in admiralty only upon proof of unseaworthiness of the vessel. Pacific S. S. Co. v. Peterson, 278 U. S. 130, 49 S. Ct. 75, 73 L. Ed. 220; Chelentis v. Luckenbach S. S. Co., 247 U. S. 372, 38 S. Ct. 501, 62 L. Ed. 1171; The Osceola, 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760."

This doctrine was attacked in *Seas Shipping Company v. Sieracki*, 328 U. S. 85, and this court, after a painstaking analysis of the law, stated (U. S. p. 99):

> "Running through all of these cases, therefore, to sustain the stevedore's recovery is a common core of policy which has been controlling, although the specific issue has varied from a question of admiralty

jurisdiction to one of coverage under statutory liability within the admiralty field. *It is that for injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protections, regardless of the fact that he is employed immediately by another than the owner. For these purposes he is, in short, a seaman because he is doing seaman's work and incurring a seaman's hazards.*" (Emphasis supplied.)

Notwithstanding the clear mandate of the Sieracki decision, attempts were thereafter made to limit its application only to those harbor workers engaged in loading and unloading vessels. This court in *Pope and Talbot v. Hawn*, 346 U. S. 406, repudiated that effort. There, a ship's carpenter was injured while engaged in repairing the vessel's loading equipment. In rejecting the attempts to limit the application of the *Sieracki* doctrine, this court said (U. S. pp. 412-413):

"We are asked to reverse this judgment by overruling our holding in Seas Shipping Co. v. Sieracki, (U S) supra. Sieracki, an employee of an independent stevedoring company, was injured on a ship while working as a stevedore loading the cargo. We held that he could recover from the shipowner because of unseaworthiness of the ship or its appliances. We decided, this over-strong protest that such a holding would be an unwarranted extension of the doctrine of seaworthiness to workers other than seamen. That identical argument is repeated here. We reject it again and adhere to Sieracki. We are asked, however, to distinguish this case from our holding there. It is pointed out that Sieracki was a 'stevedore.' Hawn was not. And Hawn was not loading the vessel. On these grounds we are asked to deny Hawn the protection we held the law gave to Sieracki. These slight differences in fact cannot fairly justify the distinction

urged as between the two cases. *Sieracki's legal protection was not based on the name 'stevedore' but on the type of work he did and its relationship to the ship and to the historic doctrine of seaworthiness.*"

The decisions from other circuits involving the same factual premises are likewise in direct conflict with the decision of the court below in the case at bar. In *Halecki v. United New York and New Jersey Sandy Hook Pilots Assn.*, 251 F. 2d 708, cert. granted, 26 LW 3355, a similar set of facts was involved. There the vessel was taken to a pier in a repairyard for *annual overhaul and repairs*. It was then manned only by a watchman. Part of the work involved cleaning the ship's generators by spraying them with carbon tetrachloride, and one of the workers of the contractor who was so engaged met his death from the fumes of the carbon tetrachloride. Judge Learned Hand reviewed this court's opinion in *Sieracki* and subsequent decisions and made the following pertinent observations, which are clearly in conflict with the ruling adopted by the court below (pp. 711-712):

> "Quite a different question arises as to the *warranty of seaworthiness*, for, if that attached, it imposed an absolute liability, if the engine-room was not properly equipped. . . . In Guerrini v. United States, 2 Cir., 167 F. 2d 352, the ship, as in the case at bar, was moored in Brooklyn alongside a dock and the libellant, an employee of a subcontractor, was engaged in cleaning her boilers and tanks, when he was hurt by slipping on a grease spot. We held that the doctrine of Seas Shipping Co. v. Sieracki, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, did not apply. However, that was in 1948 before either Pope & Talbot v. Hawn, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143, or Petterson v. Alaska S.S. Co., 347 U. S. 396, 74 S. Ct. 601, 98 L. Ed. 798, was decided; *it is now clear that we were wrong both in limiting the warranty to those doing longshore-*

men's duties and in supposing that the surroundity of 'control' of the ship was relevant. We can see no distinction between the work of the decedent in the case at bar and that of the plaintiff in Pope & Talbot v. Hawn, supra, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143, which was carpenter's repair work."

The rule in the Fourth Circuit is likewise in conflict with the decision of the court below. In *United States v. Lucienne*, 28 F. 2d 725, affirmed 281 U. S. 38, the vessel had been laid up, as was the "Mary Austin" here, and repairs were being made to ready the vessel for sea. The worker was killed while engaged in the work of preparing the vessel for sea. Chief Judge Parker, speaking for the court, made the following analysis (p. 728):

"The Hybert had been laid up, it is true, but *some time prior to the death of decedent she had been taken to the dry dock and was undergoing repairs preparatory to a voyage*. Decedent was employed as third officer and came on duty for the first time on the morning of his death. *At the time he received the fatal injury he was engaged in preparing the vessel for sea.*

"A seaman was defined by Congress in the Act of June 7, 1872, as any person employed or engaged to serve on board a vessel. R. S. Sec. 4612 (46 USCA Sec. 713). And in construing the Merchant Marine Act here under consideration the Supreme Court has held stevedores to be seamen within the meaning of the act because engaged in maritime service formerly rendered by the ship's crew. International Stevedoring Co. v. Haverty, 272 U. S. 50, 47 S. Ct. 19, 71 L. Ed. 157. In that case the court said: 'We cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the

ship. The policy of the statute is directed to the safety of the men and to treating compensation for injuries to them as properly part of the cost of business. If they should be protected in the one case they should be in the other.'

"Certainly seamen employed to take a ship to sea *who are engaged in making her ready for the voyage are not to be denied the status of seamen and the benefit of the act merely because the vessel is not commissioned at the time.* See The Progresso (D. C.) 46 F. 292; The William Leishear (D. C.) 21 F. (2d) 862." (Emphasis supplied.)

The same conflict which is thus manifest in the decision of the court below with decisions of the Courts of Appeals for the Second and Fourth Circuits, as above indicated, is also apparent within the Court of Appeals for the Third Circuit. Another panel of that court sitting in the case of *Read v. United States; supra*, 201 F. 2d 758, reached a contrary conclusion upon a set of facts analogous to those at bar. In the *Read* case the S/S. "Langdon Cheves" was being transformed from a liberty-type ship to a troop transport, and the shipowner engaged a general contractor to make the necessary alterations and repairs. This contractor in turn engaged a subcontractor to assist in the job of conversion, which entailed major changes and repairs. In that case, as in the case at bar, the contract between the shipowner and the contractor gave the latter complete control over the work and required the latter to take all of the necessary precautions for the safety of all those on board. In the course of the work, an employee of the subcontractor was injured while engaged in working in one of the four deep tanks in the lower hold of the vessel because of an alleged failure to provide adequate safeguards around the deep tanks and because of inadequate lighting. The Court of Appeals for the Third Circuit, in that case, held that it was unnecessary

to consider the question of the shipowner's negligence because the warranty of seaworthiness was clearly applicable in favor of the repairman. Said the court at page 761:

> "The Sieracki case also specifically stated that the vessel's obligation of seaworthiness extends to stevedores while working aboard the ship. In Hawn v. Pope & Talbot, Inc., 3 Cir., 1952, 198 F. 2d 800, we held that the *vessel's liability for unseaworthiness extended to a carpenter employed by one having a contract to repair the ship—as in the instant case.*
>
> "On the score of unseaworthiness we have already found that there were two or three defective lighting appliances on the main deck *which the libellant and other workmen tried to use but could not.* From that testimony it is reasonable to infer that these appliances were defective at the time the ship was turned over to the subcontractor since there is no evidence that those lights had been used by anyone during the day. *Clearly then, there was here a 'failure to supply and keep in order the proper appliances appurtenant to the ship.'* The Osceola, *supra.*
>
> "*We conclude, therefore, that there was a breach of the shipowner's warranty of seaworthiness.*" (Emphasis supplied.)

See also *Crawford and Lucibello v. Pope & Talbot, Inc.*, 206 F. 2d 784, wherein two shipcleaners were injured in the course of a cleaning operation on board the vessel. Chief Judge Biggs, speaking for the court, held the warranty to be applicable as follows (p. 790):

> "As to the question whether Crawford and Lucibello under the circumstances at bar were libellants in whose favor the doctrine of unseaworthiness should apply, we have no doubt that they were. *Their work in the deep tanks was clearly 'ship's work' within the meaning of the Sieracki case.*" (Emphasis supplied.)

The rule of law adopted by the Court of Appeals for the Third Circuit in the instant case is thus not only in conflict with the decisions from other circuits, but also with decisions of other panels within its own circuit. This court, therefore, should grant certiorari on the basis of this conflict in decisions alone, and in order to obtain uniformity of decision among the various circuits in the interpretation of this court's opinion in *Seas Shipping Company v. Sieracki, supra,* 328 U. S. 85.

Second Point: The Decision of the Court Below Converts the Non-delegable Duty to Provide a Safe Place to Work from the Warranty of Seaworthiness to a Question of Due Care Under Theories of Negligence. The Lower Court's Decision Is Thus in Conflict With This Court's Opinion in Mahnich v. Southern S. S. Co., 321 U. S. 96, and the Decision of the Court of Appeals for the Ninth Circuit in Pacific Far East Lines v. Williams, 234 F. 2d 378, and the Decisions of the Court of Appeals for the Second and Sixth Circuits Respectively in Poignant v. U. S., 225 F. 2d 595 and The Seeandbee, 102 F. 2d 577.

The conflict of decisions within the Third Circuit itself in the interpretation of the shipowner's liability under the duty to provide a safe place to work is most marked in the case of *Cookingham v. U. S.*, 184 F. 2d 213, where a seaman was injured as a result of an unsafe condition created by a foreign substance on a stairway. The majority in that case held that the duty to provide a safe place to work did not fall within the warranty of seaworthiness but merely involved the exercise of reasonable care. The shipowner was therefore exonerated on the ground that he did not have notice of the existence of the dangerous condition. This view of the majority was sharply criticised by the Court of Appeals for the Ninth

Circuit in *Pacific Far East Lines v. Williams*, 234 F. 2d 378, where that court took a contrary view. The doctrine of the Third Circuit was even more strongly repudiated by the Second Circuit in *Poignant v. U. S.*, 225 F. 2d 595, where the late Judge Frank, in a concurring opinion had this to say about the novel theory adopted by the Third Circuit in the *Cookingham* case in connection with the warranty of seaworthiness (p. 603):

> "The Third Circuit has since interpreted its Cookingham 'transitory' doctrine to mean that the ship's liability for a 'transitory' object depends upon the length of time during which the object was not removed. See Crawford v. Pope & Talbot, Inc., 3 Cir., 206 F. 2d 784, 789, 790. I understand that my colleagues repudiate that thesis. The Third Circuit, in a still later case, explaining the Cookingham doctrine, has said that it turns on a distinction between (a) the duty to provide a seaworthy ship, which is absolute, and (b) the duty to provide a safe place to work, which, so that court holds, demands reasonable care only. See Brabazon v. Belships Co., 3 Cir., 202 F. 2d 904, 906. *I think that distinction directly at odds with the Supreme Court's decisions. I read my colleagues' opinion as repudiating it also.*" (Emphasis supplied.)

In *The Seeandbee*, 102 F. 2d 577, the Court of Appeals for the Sixth Circuit again related the duty to provide a safe place to work as part of the warranty of seaworthiness in these terms (p. 581):

> "It is the duty of a shipowner or master to supply a seaworthy vessel for its employees and *this does not depend on the exercise of reasonable care, but is absolute*. The H. A. Scandrett, 2 Cir., 87 F. 2d 708. A seaman does not assume the risk of injury even from obvious dangers if the proximate cause thereof is the failure of the shipowner or master to *supply and keep in order* proper appliances appurtenant to the ship

and the same rule applies for failure to provide a safe place in which to work. Cleveland Cliffs Iron Company v. Martini, 6 Cir., 96 F. 2d 632; Socony-Vacuum Oil Company v. Smith, 305 U. S. 424, 59 S. Ct. 262."

This court in *Mahnich v. Southern S. S. Co., supra*, 321 U. S. 96, wherein the liability was predicated exclusively on the warranty of seaworthiness under the maritime law before the Jones Act, likewise related the duty to the warranty in these terms (p. 102):

"In thus refusing to limit, by application of the fellow servant rule, the liability of the vessel and owner for unseaworthiness, this Court was but applying the familiar and then well established rule of non-maritime torts, that the employer's duty to furnish the employee *with safe appliances and a safe place to work*, is non-delegable and not qualified by the fellow servant rule."

Both the trial judge and the Court of Appeals below conceded that the shipowner had a non-delegable duty to provide a safe place to work, but nevertheless exonerated the shipowner on the ground that this duty was related only to theories of negligence. Here again the court below departed from the long-established rule that the duty to provide a safe place to work is an inherent part of the warranty of seaworthiness, and the obligation under this doctrine is absolute and not dependent upon the exercise of reasonable care. *Seas Shipping Company v. Sieracki, supra*, 328 U. S. 85. The conflict between the decision in this case with the rule announced by this court and by other circuits, likewise, calls for a review of the matter.

SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
DEC 29
JAMES ... Clerk

IN THE

Supreme Court of the United States

October Term, 1959.

No. 11

EDGAR ALLEN WEST,
Petitioner,

v.

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF COMMERCE,
MARITIME ADMINISTRATION

v.

ATLANTIC PORT CONTRACTORS, INC.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTORARI.

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IN THE

Supreme Court of the United States.

October Term, 1958.

No. 541.

EDGAR ALLEN WEST,

Petitioner,

v.

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF COMMERCE,
MARITIME ADMINISTRATION

v.

ATLANTIC PORT CONTRACTORS, INC.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent-Impleaded, Atlantic Port Contractors, Inc., respectfully prays that issuance of a Writ of Certiorari to review the final judgment of the United States Court of Appeals for the Third Circuit entered on July 2, 1958 be denied.

OPINIONS OF THE COURTS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 143 F. Supp. 473 (E. D., Pa., 1956). The opinions of the United States Court of Appeals for the Third Circuit are reported at 246 F. 2d 443 (1957) and 256 F. 2d 671 (1958).

COUNTER STATEMENT OF THE CASE.

Petitioner, a shoreside engineer employed by respondent-impleaded, was injured on November 21, 1951 while working in the engine room of the S. S. "Mary Austin". He seeks a review of the judgment of the United States Court of Appeals for the Third Circuit which affirmed the action of the United States District Court of the Eastern District of Pennsylvania in dismissing the libel and the action over against the impleaded respondent.

The facts as found by the lower courts may be stated as follows. Following World War II, the "Mary Austin" had been completely deactivated and placed in the so-called "Moth Ball Fleet" (143 F. Supp. 473, 475).

During the Korean conflict the decision was made to reactivate her and she was brought to a pier in Philadelphia where the respondent-impleaded, having been awarded the contract, had complete charge of reactivation (143 F. Supp. 473, 475).

Petitioner was injured while working in the low pressure cylinder of the ship's main engine. He was hit on the knee by a metal plug from an overhead water pipe when some other employee of respondent impleaded turned on the water (143 F. Supp. 473, 476).

Contrary to petitioner's statement, the "Mary Austin" had no crew. While there were employees of the United States aboard the vessel, they had signed no Articles and were not aboard as a ship's crew but as inspectors assisting the Port Engineer to make sure that the work done was in accordance with the contract and specifications (143 F. Supp. 473, 475, 476).

ARGUMENT.

I.

A.

Petitioner asserts the existence of a rule holding that a vessel under repair in navigable waters is a vessel in navigation.

The cases he cites and relies upon fail to sustain the existence of such a rule.

All of the cases cited at page 6 of the Petition are concerned with the status of the craft involved, *e.g.*, dredges, scows, houseboats, etc. as "vessels" so as to be subject to maritime liens. None of the cases deals with what constitutes a "vessel in navigation".

The question of what constitutes a "vessel" should not be confused with the entirely separate and distinct concept of a "vessel in navigation".

The existence of a vessel as an entity begins when she is launched and continues so long as her identity is preserved. *Tucker v. Alexandroff*, 183 U. S. 424, 438 (1902). However, even when launched, a "vessel" does not become a "vessel in navigation" until she in fact is engaged in navigation and marine commerce. *Frankel v. Bethlehem-Fairfield Shipyard, Inc.*, 132 F. 2d 634 (4th Cir., 1942), certiorari denied, 319 U. S. 746 (1943). When a vessel is withdrawn from navigation and commerce, although she retains her identity as a "vessel" for jurisdictional purposes, she has lost her character or status as a "vessel in navigation". *Desper v. Starved Rock Ferry Co.*, 342 U. S. 187 (1952); *Autus v. Interocean S. S. Co.*, 108 F. 2d 185 (6th Cir., 1939).

The concept of a "vessel in navigation" is not determined by whether or not she is afloat but rather from a consideration of all factors and circumstances surrounding the period in question. The trial judge found, 143 F. Supp. 473, 479:

> "The fact that the S. S. Mary Austin was afloat is not controlling; although, it should be noted that she most certainly was in her then condition not a navigable vessel. . . ."

The trial court then quoted from the *Despot* case, *supra*, to the effect that there was no vessel engaged in navigation.

It is plain that the "Mary Austin" was not physically able to operate in the functional manner for which she was designed. As previously noted, she had no crew. There was no showing that she possessed a Coast Guard certificate authorizing her to be in service or that she conformed to American Bureau of Shipping Standards.

The trial judge concluded that the "Mary Austin" was not a vessel in navigation and it is submitted that he was eminently justified in so concluding.

I.

B.

Petitioner cites and relies upon *Bogosich v. Union Drydock & Repair Co.*, 67 F. 2d 377 (3rd Cir., 1933).

Examination of the opinions of both the Court of Appeals for the Third Circuit and that of the District Court, the latter being appended as a footnote to the Circuit Court's opinion, fails to sustain the assertion made by petitioner that the vessel (a car float) was taken into dry dock *for major repairs*. Other than describing in detail the manner by which libellant was injured while securing a plank to the hull of the car float, the opinions are silent as to the nature and extent of the overall repairs.

While petitioner correctly quotes Judge Thompson, the statement made was purely obiter dictum. Analysis of the opinions clearly shows that the question of the status of the libellant as a seaman was not at issue. The real point involved were whether or not a seaman could recover on the basis of unseaworthiness under admiralty jurisdiction, his right under the Jones Act being barred by

the Statute of Limitations; and whether or not the respondent could assert negligence of fellow servants as a defense.

Petitioner states (p. 11):

> "It has long been recognized that harbor workers engaged in repairing and refitting a vessel have the status of seamen, even though the vessel is taken out of service and placed in drydock for the repairs."

Berryhill v. Pacific Far East Line, Inc., 238 F. 2d 385 (9th Cir., 1956), affirming 138 F. Supp. 859, certiorari denied, 354 U. S. 938 (1957), directly contradicts this statement. Berryhill, a shipyard employee, was injured by an exploding grinding wheel while carrying out major repairs to a ship in dry dock. The lower court granted defendant shipowner's motion for judgment on the pleadings on the grounds that the warranty of seaworthiness was not applicable. The Circuit Court affirmed. While in part the decision rested upon the fact that the ship was in dry dock and the grinding wheel belonged to the shipyard not the ship, the decision rests equally upon the reasoning that the nature of the work performed was outside of the scope of work performed historically or currently by a crew. The Court stated at p. 387:

> "The facts in this instant case would extend the doctrine of absolute liability for unseaworthiness, Mahnic v. Southern Steamship Company, 321 U. S. 96, 100 . . . , beyond any previous holdings. Here the repairs had nothing to do with loading or unloading the ship. The propulsion machinery of the vessel itself was being repaired. Not all repairs are 'ship's work,' to be performed, historically or currently, by the crew."

There is no conflict between the decision in the instant case and the holdings of this court in *Seas Shipping Company v. Sieracki*, 328 U. S. 85 and *Pope and Talbot v. Hawn*, 346 U. S. 406. In each case the nature or type of work done and its relationship to the ship brought Sieracki and

Hawn within the doctrine of seaworthiness. The nature of the work performed by West and its relationship to the "Mary Austin" are not such as were historically or currently performed by the crew.

Decisions from other circuits involving the same factual situations are not in conflict with the decision of the court below.

Halecki v. United New York and New Jersey Sandy Hook Pilots Ass'n., 251 F. 2d 708 (2nd Cir., 1958) certiorari granted, 357 U. S. 903, was decided by the Second Circuit on the same day as *Berge v. National Bulk Carriers, Inc.*, 251 F. 2d 717 (2nd Cir., 1958) affirming 148 F. Supp. 608, certiorari denied, 356 U. S. 958. In *Berge*, the libellant, a shoreside repair worker, was injured aboard a vessel undergoing major interior repairs and alterations, alongside a pier, (148 F. Supp. 608), as was the "Mary Austin". The trial court (Judge Murphy) in denying a recovery on the ground of unseaworthiness followed the *Berryhill* decision, *supra*, and also the decision of the lower court in the case at bar.

In *Halecki*, the decedent was an employee of an electrical repair contractor engaged in using carbon tetrachloride to clean the generators of a vessel moored to a pier for annual overhaul and repairs. A majority of the Second Circuit felt that the nature of the work being performed was that traditionally of seamen, although it was also conceded that:

> "As might be expected, so shadowy a line of demarcation will in application produce inconsistent results". (251 F. 2d 708, 711.)

Halecki was argued before this Court on October 23, 1958.

It is submitted that the case at bar is more analogous to *Berge* than *Halecki*.

Petitioner's statement (p. 14) that "The rule in the Fourth Circuit is likewise in conflict with the decision of the court below" is incorrect. The case relied on, *United*

States v. Lindgren, 28 F. 2d 725 (4th Cir., 1928), affirmed, 281 U. S. 38 is not in point. The status of the decedent therein as a seaman (third officer) was admitted in the pleadings and conclusively determined thereby. The principal question involved was whether his administrator could recover under the Virginia death statute or whether the sole remedy was under the Merchant Marine Act of 1920.

Petitioner ignores the most recent and closely similar case in the Fourth Circuit, *Raidy v. United States*, 252 F. 2d 117 (4th Cir., 1958) affirming 153 F. Supp. 777, certiorari denied, 356 U. S. 973 (1958). In a per curiam opinion the Fourth Circuit adopted as its own the opinion of District Judge Chestnut. The latter had cited with approval and followed the decision of the trial judge in the case at bar. 153 F. Supp. 777, 780.

The *Raidy* case denied a recovery on the basis of either negligence or unseaworthiness to a shipyard worker who fell through a hole in a catwalk due to the absence of a footplate which was part of the major repair and replacement work being performed on the vessel, a seagoing dredge.

Finally, petitioner has asserted that the decision below is in conflict with two other decisions of the Third Circuit, *Read v. United States*, 201 F. 2d 758 and *Crawford and Lucibello v. Pope & Talbot, Inc.*, 206 F. 2d 784.

The *Read* case is distinguishable, as pointed out by the court below, on the amount of work involved.

The "Mary Austin" was a dead, completely deactivated vessel which had to be completely rehabilitated and repaired over a period from November 5 to December 11, 1951. In *Read*, the "*Langdon Chaves*" was undergoing structural alterations to change her cargo capacity from freight to troops. The contract called for the work to be done between May 23, 1944 and May 28, 1944, a period of five days. 201 F. 2d 758, 760.

In addition, although it does not appear in the opinion, the record in the *Read* case establishes that the ship was a "live" vessel in navigation with officers and crew aboard while the alterations were being carried out.

The *Crawford* case, *supra*, also involved a "live" ship which was in navigation with officers and crew aboard. That Crawford and Lucibello were doing seaman's work is clearly demonstrated by the following quotation from the court's opinion:

> ". . . At the very time Crawford and Lucibello were engaged in cleaning the deep tanks in No. 1 hold, seamen of the ship were similarly engaged in the deep tanks in an adjoining hold." (206 F. 2d 784, 790.)

There is no conflict with decisions from other circuits, on the contrary, the opinion of the court below is in harmony with decisions in the Second, Fourth and Ninth Circuits and in addition with the case of *Owens v. United States* 1958 A. M. C. 216 (S. D., Fla., 1957).

II.

The libel filed herein predicated liability upon the distinct and separate grounds of unseaworthiness and negligence.

We have previously demonstrated that under the applicable facts and appropriate law there was no vessel in navigation *and* the nature of the services performed by petitioner in relation to the vessel were not such as had been traditionally and historically performed by seamen. Petitioner, therefore, failed to make out a cause of action based upon unseaworthiness and dismissal of the libel on this ground was proper.

There is no conflict between the decision of the Court below and the decision of this Court in *Mahnich v. Southern S. S. Co.*, 321 U. S. 96. *Mahnich* concerned injuries suffered by a seaman, while at sea, when a scaffold fell due to the breaking of a defective piece of rope supplied by the mate. The case deals solely with the question of seaworthiness; negligence as a separate ground or basis of recovery was not at issue.

The decision of the Court of Appeals for the Sixth Circuit in *The Secundbee*, 102 F. 2d 577 (1939) is in the same category as *Mahnich, supra*.

The assertion that the opinion of the court below and that of the Ninth Circuit in *Pacific Far East Lines, Inc. v. Williams*, 234 F. 2d 378, are in conflict is not correct. The *Williams* case involved injuries to a longshoreman, engaged in loading a refrigerator ship, who slipped as a result of moisture or frost on a bar recessed in the coaming of a hatch due to inadequate lighting.

In response to a contention by the shipowner that the moisture or frost was a "transitory" condition, the court did refer to the case of *Cookingham v. United States*, 184 F. 2d 213, affirming 87 F. Supp. 203, certiorari denied, 340 U. S. 935 (1951), as follows:

> "Assuming the doubtful proposition that the Cookingham holding is recognized in this circuit as persuasive authority, we see no analogy between it and the case before us." (234 F. 2d 378, 379.)

The alleged repudiation of the *Cookingham* case by the Second Circuit in *Poignant v. United States*, 225 F. 2d 595 (1955) is not correct. Neither Judge Hincks who wrote the majority opinion nor Judge Clark joined in Judge Franks' concurring opinion.

Although both the trial judge and the Court of Appeals did say that the shipowner had a non-delegable duty to provide a safe place to work, they did not exonerate the shipowner on the ground that this duty was related *only* to theories of negligence. Having adequately and properly disposed of the seaworthiness question, both of the Courts below proceeded to consider whether or not petitioner had shown any negligence upon the part of the respondent, United States. The trial court concluded that petitioner's injuries were caused by the negligence of an employee of Atlantic Port Contractors, respondent-impleaded, in turning on the water supply and thus causing the plug to come

out of the pipe. There was no negligence found on the part of the United States.

The alleged conflicts between decisions of this Court, other circuits and the court below do not exist.

III.

Petitioner takes the untenable position that the negligent act of the employee of respondent impleaded, Atlantic Port Contractors, was an act for which the respondent, United States, bears responsibility. He cites and relies upon *Dixon v. United States*, 219 F. 2d 10 (2nd Cir., 1955). It is submitted that the case is clearly distinguishable.

The status of petitioner, West, has been previously detailed.

Dixon was the Chief Officer of a vessel in commerce and navigation. He was injured during a voyage in a foreign port when the upper rungs of a ladder he was descending pulled out or broke. He was engaged in checking the lower rungs of the ladder which had recently been repaired by an independent contractor.

The "non-delegable" duty referred to in *Dixon* is that of a shipowner to use due care to maintain the seaworthiness of his vessel after she commences her voyage (219 F. 2d 10, 15, 16).

The owner of a dead, deactivated vessel has no obligation as in *Dixon* to a business invitee such as the petitioner in the case at bar.

CONCLUSION.

The basic issues involved herein have already been presented to this Court in the *Berryhill*, *Birge* and *Baidy* cases, *supra*.

This Court has uniformly denied certiorari in each of those cases.

The decision in this case of the Court of Appeals for the Third Circuit does not conflict with any decisions of this Court or of other Courts of Appeals.

For the foregoing reasons, it is respectfully submitted that the issues involved herein do no merit a review by this court, and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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DEC 31 1958
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No. [redacted] 11

In the Supreme Court of the United States

OCTOBER TERM, 1958

EDGAR ALLEN WEST, PETITIONER

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF COMMERCE, MARITIME ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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DECEMBER 1958.

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 541

EDGAR ALLEN WEST, PETITIONER

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF COMMERCE, MARITIME ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania (Pet. App. 12a)[1] is reported at 143 F. Supp. 473. The opinion of the Court of Appeals for the Third Circuit (Pet. 23–27) is reported at 256 F. 2d 671.

JURISDICTION

The judgment of the Court of Appeals was entered on July 2, 1958. On September 9, 1958, Mr. Justice Brennan entered an order extending the time for filing a petition for a writ of certiorari in this case until

[1] "Pet. App." refers to petitioner's appendix in the Third Circuit.

November 29, 1958. The petition for a writ of certiorari was filed on November 28, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether both courts below correctly declined to permit recovery against a shipowner of a deactivated vessel—undergoing complete reactivating repairs while tied to a pier—for an alleged breach of a warranty of seaworthiness in a suit brought by a shoreside marine engineer, employed by the ship repair contractor, where at the time of the injury the libelant was engaged in performing major repairs and was injured by an article which was among the items specified to be inspected, repaired, and tested by the ship repair contractor.

2. Whether both courts correctly held that the shipowner was not negligent in the circumstances of this case.

STATEMENT

This action, filed pursuant to the Public Vessels Act, 46 U. S. C. 781, *et seq.*, was instituted by petitioner by a libel *in personam* against the United States as owner of the liberty ship, S. S. "MARY AUSTIN" (Pet. App. 3a). The United States impleaded the reactivation repair contractor, libelant's employer, Atlantic Port Contractors, Inc. (Res. App. 112b).[2] The libel alleged that the vessel was unseaworthy, that employees of the respondent were negligent, and that the respondent had failed to provide petitioner with

[2] "Res. App." refers to respondent's appendix in the Third Circuit.

a reasonably safe place to work (Pet. App. 4a). The undisputed basic facts, as found by the District Court and the Court of Appeals, are as follows:

After World War II, the "MARY AUSTIN" was completely deactivated and placed in "moth balls" at Norfolk, Virginia. In furtherance of the deactivating process, all water pipes, boilers, and tanks were drained, and then a special oil preservative was run through the system to prevent it from rusting (Pet. App. 13a; Pet. 24).

Shortly after the initiation of the Korean hostilities, the "MARY AUSTIN" was ordered reactivated, and the contract for that job was let to Atlantic Port Contractors, Inc. Under the terms of this contract, Atlantic was to overhaul the vessel completely and was specifically required to clean and repair all water lines, to replace all defective or missing plugs, and to test all lines before placing them in active operating condition (Pet. App. 13a; Pet. 24).

The contract further provided that the vessel be delivered into the possession of Atlantic, which was to have complete responsibility for and control over the manner in which the work was to be done. In order to insure compliance with the contract, the United States reserved the right to inspect Atlantic's work while it was in progress (Pet. App. 14a).

On November 5, 1951, the "MARY AUSTIN" was towed to Philadelphia, Pennsylvania, and tied alongside a pier. The vessel remained tied to the pier from November 7, 1951, until the completion of the repairs on December 11, and in accordance with the terms of the contract the manner and progress of the repairs

were under the complete control of Atlantic during that interval (Pet. App. 14a; Pet. 24).

The libelant was hired by the Atlantic Port Contractors, Inc., as a marine engineer (Pet. App. 12a). On November 21, 1951, libelant was working inside the low pressure cylinder of the main engine. He was struck on his left knee by a metal plug which was forced out of an overhead water pipe when a fellow employee of the repair contractor unexpectedly turned on the water (Pet. App. 16a; Pet. 24).

The District Court specifically found that respondent was not guilty of negligence; that the S. S. MARY AUSTIN was in satisfactory condition for reactivation purposes and was not unseaworthy; and that, in any event, the warranty of seaworthiness did not extend to a specialist like petitioner engaged in major repairs on the vessel (Pet. App. 19a). The court emphasized the fact that the work being done by petitioner—major repairs on a complex engine—was not the type of work that was ordinarily performed by seamen, but was more in the nature of home port structural repairs (Pet. App. 23a).

On appeal, the Court of Appeals for the Third Circuit affirmed (256 F. 2d 671). The court agreed with the District Court that respondent was not negligent as to the warranty of seaworthiness; the court found analogous the recent decisions of the Fourth Circuit in *Raidy* v. *United States*, 252 F. 2d 117, certiorari denied, 356 U. S. 973, and the Ninth Circuit in *Berryhill* v. *Pacific Far East Line, Inc.*, 238 F. 2d 385, certiorari denied, 354 U. S. 938. In each of the three cases, a shoreside specialist was engaged in ma-

jor repairs to a vessel "laid up" for complete rehabilitation. And, as previously determined by the Ninth and Fourth Circuits, the court below held that such work was not traditionally accomplished by members of the crew and was not encompassed, therefore, within the protection of the seaworthiness warranty.

ARGUMENT

The District Court and the Court of Appeals correctly held that, under the controlling principle for recovery on the basis of unseaworthiness as established by this Court in *Seas Shipping Co., Inc.* v. *Sieracki,* 328 U. S. 85, and applied by this Court in subsequent decisions,[3] a shipowner is not liable in the circumstances of this case. The decisions below are in conformity with the rule of those cases, *i. e.*, that while the warranty of seaworthiness is not restricted exclusively to seamen, those who are entitled to its protection must be doing seamen's work and incurring seamen's hazards. Contrary to petitioner's position, there is no true conflict with the decisions of this Court, or with decisions of other courts of appeals which have consistently applied this principle to varying factual situations. Indeed, the rulings here were expressly based on, and are in accord with, the recent decision of the Court of Appeals for the Fourth Circuit in *Raidy* v. *United States*, 252 F. 2d 117, involving substantially identical facts, in which this Court recently denied a petition for a writ of certiorari, 356 U. S. 973. Petitioner's contention of con-

[3] *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406; *Alaska Steamship Co.* v. *Petterson*, 347 U. S. 396, affirming, *per curiam*, *Petterson* v. *Alaska Steamship Co.*, 205 F. 2d 478 (C. A. 9).

flict with other decisions in regard to that part of the holding exonerating the United States from negligence is equally unfounded. There is no occasion for further review.

1. (*a*). It has been established by this Court that a shipowner's obligation to provide a seaworthy ship extends to individuals other than seamen if, at the time of the injury, they were doing seamen's work and were exposed to seamen's hazards.[1] *Seas Shipping Co., Inc.* v. *Sieracki*, 328 U. S. 85, 95, 99. In two subsequent decisions, the Court has reaffirmed this position. In *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, the libelant was injured while performing minor repairs on the loading equipment. This Court, in affirming the holding of the Court of Appeals permitting recovery on the ground of unseaworthiness, expressly predicated its decision on the ground that the repair involved was inextricably related to the loading process itself, work considered traditionally and historically within the scope of the crew's duties. And in *Alaska Steamship Co.* v. *Petterson*, 347 U. S. 396, the Court affirmed, *per curiam* and without opinion, a decision of the Ninth Circuit granting the protection of the warranty of seaworthiness to a workman injured by a breaking block, also while engaged in the ship's service of loading and unloading.[2]

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[1] In *Sieracki*, the libelant was a stevedore injured while aboard and loading the shipowner's vessel.

Petterson v. *Alaska Steamship Co.*, 205 F. 2d 478.

[2] While the block apparently belonged to the stevedoring company, that company had been offered the option by the shipowner of using its own or the ship's block, thus providing the basis for considering the equipment that of the ship. See

Thus, each of the relevant pronouncements by this Court has been limited to the factual context of work considered by the Court to be an historical function of the seamen. None of these decisions provides a basis for petitioner's suggestion that the guiding criterion of "ship's service" encompasses any and all work accomplished by workmen on a vessel, whether or not the work is part of major repair which was not historically the work of seamen. To the contrary, in *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187, 190, this Court indicated that work which would customarily be done by exclusively shore-based personnel would not constitute seamen's work. The Court noted that (342 U. S. at 190): "[t]he work in which the decedent was engaged at the time of his death quite clearly was not that usually done by a 'seaman.'" In the *Desper* case, the vessels were not afloat and had neither captain nor crew. In the instant action, it is true that the "MARY AUSTIN" was afloat but it was similarly unmanned and, having been completely deactivated, it was as much removed from navigation as if it had been physically removed from the water.

There is no question that both the District Court and the Court of Appeals correctly determined that the work in which the libelant was employed was not historically that of a seaman. Petitioner does not question this fact anywhere in his petition for certiorari, but instead relies upon the argument that the warranty of seaworthiness runs to anyone who is doing any manner of work on a vessel, irrespective

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Berryhill v. *Pacific Far East Line*, 238 F. 2d 385, 387 (C. A. 9), certiorari denied, 354 U. S. 938.

of whether it is in active use. Seamen have made minor repairs, but major repairs which require that the vessel be tied alongside a dock so that highly trained specialists, including marine engineers, may work on her are not within the normal purview of a seaman's duties.[7]

(*b*) Petitioner's assertion of a true conflict in decision between the ruling below and those of other courts of appeals is unfounded. On the contrary, both the Ninth and Fourth Circuits have recently been presented with cases involving substantially identical factual situations. *E. g., Berryhill* v. *Pacific Far East Line*, 238 F. 2d 285 (C. A. 9), certiorari denied, 354 U. S. 938; *Raidy* v. *United States*, 252 F. 2d 117 (C. A. 4), certiorari denied, 356 U. S. 973.

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[7] Indeed, aside from the question of the extension of the *Sieracki* rule, it is a misnomer to speak of the defective plug here as unseaworthiness of the ship. Cf. *Raidy* v. *United States*, *supra*. The seaworthiness of a vessel and her equipment is a relative concept "dependent in each instance upon the circumstances in which its fitness is drawn in question." *Lester* v. *United States*, 234 F. 2d 625, 628, certiorari granted, 352 U. S. 889, certiorari later dismissed by stipulation. Where one of the specific purposes for which the vessel was brought in for repair, as it was here, was the replacement of all defective and missing plugs, it seems clear that the vessel was reasonably fit for the purpose of rehabilitation and was not unseaworthy with regard to the defective plug. See *Lester* v. *United States*, *supra*; *Raidy* v. *United States*, *supra*; see also *Boudoin* v. *Lykes Bros. S. S. Co., Inc.*, 348 U. S. 336. It would be anomalous to suggest that a vessel was unseaworthy for the purposes of repair because of the faulty condition of an item which the shipowner had specifically detailed to be repaired. See *Lester* v. *United States*, *supra*. Thus, the District Court's finding that the vessel was not unseaworthy was adequately supported and binding on the Court of Appeals under the rule of *McAllister* v. *United States*, 348 U. S. 19.

In both these cases, the courts refused to apply the warranty of seaworthiness to an injured worker who was performing *major repairs* on a vessel, because in that capacity he was not performing a function which had ever been performed by seamen.

As for the cases which petitioner cites as being in conflict, they are distinguishable. For example, in *United States* v. *Lindgren*, 28 F. 2d 725 (C. A. 4), affirmed, 281 U. S. 38, determined long before *Sieracki*, the court emphasized that there was an uncontradicted allegation in the pleadings that the decedent, at the time of his death, "was engaged in his duties as third mate and as such a seaman on said steamship", and therefore that this fact was conclusively determined for purposes of that trial. 28 F. 2d at 728. This is in direct contrast to the situation here where the petitioner has no connection with any voyage of the vessel and was not an officer of the ship.

The Second Circuit decision in *Halecki* v. *United New York and New Jersey Sandy Hook Pilots Ass'n*, 251 F. 2d 708, pending on writ of certiorari, No. 56, this Term, was expressly predicated upon the court's finding that the libelant was engaged in work that was traditionally that of a seaman. The court stated (251 F. 2d at 711):

> * * * We can see no distinction between the work of the decedent in the case at bar and that of the plaintiff in *Pope & Talbot* v. *Hawn*, *supra* (346 U. S. 396), which was carpenter's repair work. We think that the test is whether the work is of a kind that traditionally the crew has been accustomed to do, and as to that it makes no difference that the means

> employed have changed with time, or whether defective apparatus was brought aboard and was not part of the ship's own gear. Since the deceased was cleaning the ship, we hold that it was within the doctrine of *Pope & Talbot* v. *Hawn, supra*.

We do not agree with the reasoning or the result in that case (see the Government's *amicus curiae* brief in No. 56), but the *Sieracki* rule must be fitted to innumerable factual situations, and differences in results, reached by applying the same controlling principle of law, cannot be characterized as a "conflict". See *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, 393.

That there is probably no conflict in principle between the Second Circuit and the Third Circuit is emphasized by another decision of the former court, entered the same day as *Halecki*, in *Berge* v. *National Bulk Carriers Corp.*, 251 F. 2d 717 (C. A. 2), certiorari denied, 356 U. S. 958. In that case, the court held that there was no warranty of seaworthiness to a rigger, engaged in installing a tank bulkhead, who was injured by an unseaworthy condition of the vessel, because "the reconstruction of a ship was not traditionally the task of the crew."

We submit that there is no conflict in principle with decisions of this Court or of other courts of appeals on the *Sieracki* doctrine. There are differences in facts, and possibly some difference in approach. But the courts below properly found that, upon careful examination of the factual situation in this case, petitioner's work and the circumstances of his injury

were removed from the standard of liability established in *Sieracki* and subsequent decisions.

2. Petitioner also contends that the ruling exonerating the respondent from liability for negligence presents a conflict with decisions of other courts of appeals. The District Court, after a detailed treatment of the facts surrounding the contract of reactivation, the limited right of inspection afforded the respondent under the contract, the accident itself, and the condition of the ship, found that there was no negligence on the part of the respondent. This finding with regard to negligence was amply supported by the record and was properly upheld by the Court of Appeals which is bound by the decision of the District Court unless that decision is clearly erroneous. *McAllister* v. *United States, supra.* Thus, there is no basis for petitioner's contention that the holding with regard to negligence was in conflict with the decisions of other circuits.[8] To the contrary, since both the District Court and the Court of Appeals found that the respondent was not negligent, this case calls for the application of the two-court rule. *Comstock* v. *Group of Investors*, 335 U. S. 211, 214; *Corn Products Co.* v. *Commissioner*, 350 U. S. 46, 51.

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[8] Petitioner's arguments (Pet. 17–19) with regard to the failure of the vessel here to provide a safe place to work are predicated exclusively on cases dealing with the warranty of seaworthiness rather than negligence. And, as demonstrated in fn. 7, *supra*, p. 8, that duty is not breached where, as here, the defective plug causing the accident was one of the items specified by the vessel to the contractor as needing repair.

IN THE

Supreme Court of the United States

October Term, 1958.

No. [redacted]

EDGAR ALLEN WEST,

Petitioner,

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF COMMERCE, MARITIME ADMINISTRATION, et al.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR PETITIONER.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1958.

No. 541.

EDGAR ALLEN WEST,

Petitioner,

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF COMMERCE, MARITIME ADMINISTRATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania is reported at 143 F. Supp. 473 (E. D. Pa., 1956) (R. 8). The opinion of the Court of Appeals for the Third Circuit is reported at 246 F. 2d 443 (R. 129).

JURISDICTION.

The judgment of the Court of Appeals was entered on July 2, 1958 (R. 131). On September 9, 1958, Mr. Justice William J. Brennan, Jr., entered an order extending the time for filing a petition for writ of certiorari to and including November 29, 1958 (R. 140). The petition for certiorari was filed on November 28, 1959, and certiorari was granted on March 2, 1959. The jurisdiction of this court rests upon 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

Where the vessel is taken out of an inactive status and after navigating under tow several hundred miles through navigable waters to a pier in navigable waters and where the shipowner engaged an independent contractor to overhaul and prepare the vessel for a voyage at sea:

1. Does the warranty of seaworthiness extend to a harborworker engaged in preparing the vessel for the voyage?

2. Is the non-delegable duty to provide a safe place to work an absolute one under the warranty of seaworthiness, or is it a non-delegable duty related to negligence?

3. Is the shipowner liable in terms of negligence under his non-delegable duty to use reasonable care, where, in the course of preparing the vessel for sea, an insecurely fitted pipe plug was precipitated out of the pipe when the water pressure was turned on by one of the repairmen, striking and injuring petitioner?

STATEMENT OF THE CASE.

This action was instituted by petitioner, a ship repairman, against the United States of America, seeking to recover damages for injuries sustained aboard the S. S. "Mary Austin", a liberty ship owned by the respondent, United States. The United States impleaded the petitioner's employer, Atlantic Port Contractors, Inc., which was under contract to the United States for the overhauling and repair of the "Mary Austin". The trial was held before the court, sitting without a jury, which ruled in favor of the United States and against the petitioner herein. The judgment of the district court was affirmed by the Court of Appeals for the Third Circuit.

The undisputed facts disclose that the "Mary Austin" is a liberty ship which had been laid up in Norfolk, Virginia,

in the "mothball fleet" until the outbreak of the Korean War. In May of 1951, the Government removed the vessel from its inactive status and manned it with a crew of six men: a captain, chief mate, second mate, chief engineer, first assistant engineer and steward (R. 83). The vessel was then towed several hundred miles through navigable waters from Norfolk, Virginia, to a shipyard in Chester, Pennsylvania, where an inspection and survey of the vessel was conducted. It was then further towed through navigable waters and moored in the Delaware River at Pier 5 in Philadelphia for certain repairs. Two days later the vessel was shifted to and moored at Pier 9 in Philadelphia where the overhaul was continued to its completion. At no time was the vessel placed in drydock, the entire operation having been performed while the vessel was moored in the navigable waters of the Delaware River.

On November 21, 1951, during the course of the foregoing overhaul while petitioner was working on the vessel inside the low pressure cylinder of the main engine, he was struck on the knee by a pipe plug which had been precipitated downward from one of the overhead pipes. The court below found that the plug had been loosely fitted in its socket and was forced out when the water pressure was turned on.

Petitioner sought recovery upon two theories: (1) that the vessel was unseaworthy in that the plug which had been fitted insecurely in the pipe was incapable of withstanding the water pressure exerted upon it; and (2) that under its non-delegable duty respondent was liable under theories of negligence because the repairmen were negligent in turning on the water pressure and because respondent failed to warn anyone of the dangerous condition.

The trial court found that the warranty of seaworthiness did not extend to petitioner because the nature of the work took him "out of the class of persons to whom the warranty of complete seaworthiness runs". The trial judge held that the insecure fitting of the pipe plug in the pipe

did not create an unsafe condition, but rather that the unsafe condition resulted from the turning on of the water pressure by the repairmen. While the trial court ruled that the duty to provide a safe place to work was non-delegable, nevertheless, it held that the shipowner could not be held responsible for the actions of the contractor in turning on the water, which in turn caused the loosely fitted pipe plug to be forced out, causing petitioner's injury.

The Court of Appeals affirmed these rulings of the district court. It held that the duty to provide a safe place to work was related to theories of negligence and not to the warranty of seaworthiness, and since the accident to West was occasioned by the negligence of a fellow worker, the shipowner could not be held liable, despite its non-delegable duty in this regard. In ruling that the warranty of seaworthiness was not applicable, the Court of Appeals introduced a new theory by holding that the warranty does not apply even though the vessel may be in navigable waters, for it is not actively engaged in navigation. The court does not make clear or define the term "navigation" as used in the instant case, but it is abundantly clear that its holding and new theory is in conflict with the decisions of this court.

It must be noted at the outset that this approach to the problem is wholly erroneous because this court has already established that the warranty applies (1) if the vessel is in navigable waters; and (2) whether the injured worker is engaged in some sort of active (though undefined) service before the warranty applies. Moreover, the court below also erred in its premise as to when a vessel is not in navigation.

ARGUMENT.

Point One: A Vessel Under Repair in Navigable Waters Is a Vessel in Navigation and, Therefore, the Warranty of Seaworthiness Extends to Those Workers on the Vessel Engaged in Her Repair.

The Court of Appeals, in affirming the decision of the trial court, ruled that the warranty of seaworthiness had no application to the case at bar in that the "Mary Austin" was not a vessel in navigation at the time of the mishap.

In arriving at its conclusion, the court below sought support from a strained analogy drawn between a vessel not yet completed and one which had been in navigation, was laid up, and was now being worked upon for the sole purpose of readying her for a voyage at sea. The court below reasoned that since a vessel not yet completed was not considered a vessel in navigation, a vessel that was once in navigation but out of active service was, during the course of its preparations for a sea voyage, no different from an incomplete vessel which has not yet been placed in service. Such analogy has no basis in the law.

The distinction between the status of a vessel under construction and one which has previously been completed and, thereafter, is taken out of service, has long been recognized. *Kilb v. Menke*, 121 F. 2d 1013 (5 Cir., 1929); *The V-1813*, 65 F. 2d 789 (5 Cir., 1933). In *North Pacific S. S. Co. v. Hall Bros., etc.*, 249 U. S. 126-127, this court stated:

> "It is settled that a contract for building a ship or supplying materials for her construction is not a maritime contract. . . . But the true basis for the distinction between the construction and the repair of a ship, for purposes of the admiralty jurisdiction, is to be found in the fact that the structure does not become a ship, in the legal sense, until it is completed

and launched. '*A ship is born when she is launched, and lives so long as her identity is preserved.* Prior to her launching she is a mere congeries of wood and iron—an ordinary piece of personal property—as distinctly a land structure as a house, and subject to mechanics' liens created by state law, enforceable in state courts. In the baptism of launching, she receives her name, and from the moment her keel touches the water she is transformed and becomes a subject of admiralty jurisdiction.' Tucker v. Alexandroff, 183 U. S. 424." (Emphasis supplied.)

And in *Hercules Co. v. The Brigadier General Absolom Baird*, 214 F. 2d 66 (3 Cir., 1954), another panel of the same court which decided this case, in circumstances much the same as those at bar, stated at page 69:

"Nor is it necessarily fatal that in 1950 and part of 1951 the Baird was unable to navigate under her power. An essential element of claimant's objection is a finding that the Baird had been withdrawn from marine commerce and navigation. There is no such finding here, and we think this record could not support one if it had been made. Indeed, the efforts of everyone concerned were bent upon readying her for a sealing voyage. That is sufficient devotion to maritime commerce to make her a vessel. . . . *If the Baird ever was withdrawn from navigation and marine commerce, she was returned to those pursuits when her owners and would-be owners began putting her in shape for an intended voyage*, which in fact took place in April of 1951, libellant's services being largely responsible for her ability to depart on that voyage." (Emphasis added.)

Therefore, it is clearly erroneous to say that a vessel after having been completed and launched, and then taken

out of active service, is out of navigation when, in fact, she is simply undergoing repairs in navigable waters preparatory for sea duty.

What is more, in the case at bar, the "Mary Austin" remained in navigable waters at all times. It was taken out of its inactive status at Norfolk and was towed to Philadelphia. When thus plying the waters of the Chesapeake and Delaware Bays and the Atlantic Ocean under tow, it was clearly a vessel in navigation, at least equal to the dead barges which are towed daily over the same route and which have invariably been termed vessels in navigation. See *Warner v. Norton*, 321 U. S. 565; *Ellis v. U. S.*, 206 U. S. 246; *The Dick-Keys*, Fed. Case No. 3898; *Kate Tremaine*, Fed. Case No. 7622; *Seabrook v. Raft of Railroad Crossties*, 40 F. 596; *Saylor v. Taylor*, 77 F. 476; *McRae v. Bowers Dredging Co.*, 86 F. 344; *The Ark*, 17 F. 2d 446. In addition, when the "Mary Austin" was taken out of its laid up status, it was manned by a captain, chief mate, second mate, chief engineer, first assistant engineer and steward, all of whom were attached to the vessel and whose function was to look after the vessel's interest. In supplemental answers to Interrogatory No. 6, the respondent admitted this when it stated:

> "The members of the crew of the SS Mary Austin were Master T. G. Karso, 56 Goble, Newark, New Jersey; Chief Officer A. A. Haus, 95 Beeckman Avenue, Tarrytown, New York; Second Officer Jerome L. Greenberg, 1904 South 36th Street, Omaha, Nebraska; Chief Engineer Arthur O'Connor, 42 Conyingham Avenue, Randall Manor, Staten Island, New York; First Engineer Charles Booth, 620 Gaul Street, Philadelphia, Pennsylvania; Chief Steward Jose Salguero, 1017 Intervale Avenue, Bronx, New York."

The officers of the vessel kept log books which contained detailed accounts of the events taking place aboard the

vessel. Regular watches were stood by the crew and were recorded in the log. While the vessel was berthed at the pier undergoing repairs, certain night mates were engaged for the various watches on the vessel (R. 119). In all respects, the captain and the five other men, as aided by such other relief personnel as were required, performed the services regularly and ordinarily performed by members of the crew.[1]

The fact that these men signed no shipping articles in no way militates against the assumption that they were in fact crew members and that the vessel was in navigation. *Warner v. Norton, supra; The Falco*, 20 F. 2d 362 (2 Cir., 1927); *Jansen v. The Theodore Heinrich*, Fed. Case No. 7215; *Clark v. Montezuma Transportation Co.*, 216 N. Y. S. 295. It should be noted in this regard that shipping articles must be signed only if the vessel is engaged in foreign or intercoastal commerce, 46 USCA 564, and therefore there is no need for the crew members in this case to have signed shipping articles. See 1 Norris, Law of Seamen, Sec. 4.

Applying the principle which this court laid down in the *North Pacific S. S. Co. v. Hall Bros., supra*, the "Mary Austin" was born when she was launched and she remained a subject of admiralty jurisdiction so long as her identity was preserved; and as was stated in *Hercules Co. v. The Brigadier General Absolom Baird, supra*, if she was "withdrawn from navigation and marine commerce, she was returned to those pursuits when her owner and would-be owner began putting her in shape for an intended voyage."

In this case, the "Mary Austin" actually engaged in a voyage from Norfolk to Philadelphia after she was removed from her inactive status in Norfolk, and manned with a crew of officers. She was then prepared for a specific voyage. At the time of the petitioner's injury on November 21, 1951, in addition to the fact that the vessel was manned

1. Compare *Lawrich v. Warner Co.*, 118 F. 2d 690, and *Warner v. Norton*, 321 U. S. 565, where only one man constituted the crew of the barge without motive power.

with a captain and a crew, the ship's equipment including the pumps, boilers and dynamos were in operation (R. 65). She was at that time virtually well prepared for her contemplated voyage.

Point Two: A Shipowner Is Liable for Unseaworthiness of a Vessel to a Shore-based Worker Who Performs Labor on a Ship, Regardless of Whether the Vessel Was in Navigation.

While there is little question but that the "Mary Austin" was a vessel in navigation and that petitioner is entitled to recovery even under the test set forth by the court below, there is no requirement that a vessel be in navigation in order to have the warranty of seaworthiness apply. It is settled law that every specie of tort occurring upon navigable water is of the admiralty cognizance and that the admiralty will apply maritime concepts thereto. *The Plymouth*, 70 U. S. (3 Wall) 20; 1 Benedict Admiralty 127. The concept of unseaworthiness arose under the general admiralty law and was based upon the danger implicit in the seaman's service. Nowhere was there a requirement that the vessel be in so-called "active navigation" as distinguished from being in navigable waters.

Until well into the present century, this absolute duty upon a shipowner to provide and maintain a seaworthy vessel was restricted to seamen. Shoreside employees were relegated to recover under negligence concepts of "business invitee". However, owing to the exigencies of increasing commerce and the demand for rapidity and skill in the operation of traditional seamen's work, these duties once reserved to seamen devolved upon harbor workers, and the courts took cognizance of the fact that the devolution of the seaman's services to harbor workers carried with it the dangers implicit in that service. *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52 (1913).

Therefore, because of the nature of the work involved, the courts rendered unto this class of maritime workers the

same benefits enjoyed by the mariners whose work they assumed. Thus, when Congress gave seamen the right to recover for operating negligence and abolished the fellow servant doctrine as a defense, Mr. Justice Holmes in *International Stevedoring Co. v. Haverty*, 272 U. S. 50, expanded the beneficial scope of the Jones Act to include such shoreside employees as were performing seamen's work.

Mr. Justice Rutledge, writing for the majority, in *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, adopted the reasoning set forth in the *Imbrovek* and *Haverty* cases, and concluded that *for purposes of maintaining an action based on unseaworthiness*, the stevedore was "in short a seaman *because he is doing seaman's work and incurring a seaman's hazards.*" In *Sieracki*, Mr. Justice Rutledge described the reasons behind extending the doctrine of the warranty of seaworthiness to stevedores when he stated at pages 94-95:

> "It is essentially a species of liability without fault, analogous to other well known instances in our law. *Derived from and shaped to meet the hazards which performing the service imposes*, the liability is neither limited by conceptions of negligence nor contractual in character. It is a form of absolute duty owing to all within the range of its humanitarian policy."

See also *Pope & Talbot v. Hawn*, 346 U. S. 406 (1953).

Therefore, based upon the hazards implicit in maritime employment, there was thus extended to workers who are exposed to shipboard dangers the concepts of liability without fault.

Accordingly, as the warranty of seaworthiness is part of the general admiralty law, and as this law is called into play whenever a maritime tort is committed, the injury at bar having occurred aboard a vessel in navigable waters, the warranty of seaworthiness must be applied so long as the nature of the work involved was in preparing the vessel

for sea or to receive cargo or other purposes having to do with the vessel's enterprise. There is no requirement that the vessel be in navigation in order for this doctrine to apply because these harbor workers performed seamen's services in the vessel's interest while the vessel lay in navigable waters.

Point Three: The Warranty of Seaworthiness Extends to Maritime Workers Engaged in the Repair or Overhauling of Vessels in Navigation.

The opinion of the court below professed its devotion to the concepts set forth in *Pope and Talbot v. Hawn*, 346 U. S. 406 (1953), when it recognized that a shoreside worker engaged in loading or repairing a ship in active navigation is entitled to the benefit of the warranty of seaworthiness; however, it refused to apply that concept to the case at bar because it determined that the job of preparing a laid up vessel for active service "is not something which bears any resemblance to marine navigation."

The "Mary Austin" being a vessel in navigation at the time of the petitioner's injury, it appears difficult, if not impossible to reconcile the lower court's acceptance of the holding in *Pope and Talbot v. Hawn, supra*, with its determination in the case at bar. In both cases the neglect of the maritime duty occurred upon navigable waters and in the performance of a service necessary to enable the ship to discharge its maritime duty.

In the early days of maritime shipping, the members of the crew attended to all the services incident to the management and operation of the vessel. Thus, the seamen were often required to make major repairs to any part of the vessel, including the engines, decks, bulkheads and, on occasion, to the hull itself. Overhauling the vessel to prepare it for sea was, likewise, not infrequently the function of the members of the crew.

With the passage of time came the recognition that certain of the services performed by seamen could be done

more expeditiously by harbor workers specially trained in specific phases of the ship's business. Accordingly, this recognition of increased benefit to the shipowner caused certain of the crew's functions to fall to the lot of specialized harbor workers; however, it was nowhere contemplated that the shipowner at the time it was reaping those benefits from delegation of activity was also insulating itself from liability by such delegation.

The work performed by these shoreside workers, therefore, continued to be treated as maritime service because it had a direct bearing and bestowed direct benefit upon the vessel engaged in navigation. *State of Washington v. Dawson*, 264 U. S. 219. It was the nature of these services and their relationship to the vessel in navigable waters which caused harbor workers to be classed as seamen under the maritime law. In *Atlantic Transport Company v. Imbrovek*, 234 U. S. 52, this court stated in these terms (p. 61):

> "The libellant was injured on a ship, *lying in navigable waters, and while he was engaged in the performance of a maritime service. We entertain no doubt that the service in loading and stowing a ship's cargo is of this character.* Upon its proper performance depend in large measure the safe carrying of the cargo and the safety of the ship itself; *and it is a service absolutely necessary to enable the ship to discharge its maritime duty.* Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class '*as clearly identified with maritime affairs as are the mariners.*'" (Emphasis added.)

The same rule may be traced to the earliest days of our jurisprudence. In *Gerrity v. Bark Kate Cann*, 2 F. 241, a stevedore was injured as a result of a defective brace on the vessel. It was there contended that the longshoreman

possessed the same rights enjoyed by the members of the crew. Judge Benedict, in agreeing with this contention, stated (p. 246):

> "In regard to the presence of the libellant in the between-decks, the evidence shows that *he was not there by mere sufferance or license of the shipowner, but for the purpose of performing a service that could not be performed elsewhere, and in which the shipowner had an interest.* To be sure, the libellant was not directly employed by the shipowner, and it may be truly said that no relation by contract existed between the shipowner and the libellant. But the libellant was trimming the shipowner's ship. He was doing what was necessary to be done to enable the ship to carry the cargo in safety, and the reason why he was so employed was because the shipowner had, by a contract with the charterer, indirectly provided for the performance of this service.
>
> "*There was a relation between the shipowner and the libellant arising, not out of the mere presence of the libellant on board the ship, but out of the service he was then engaged in performing, the necessity of that service to the shipowner, and the circumstances of the libellant's employment to perform that service.*" (Emphasis added.)

Judge Benedict in the same case made it clear that it was the service on behalf of the vessel which determined the status of the worker (p. 247):

> "For these reasons I conclude that the damages sued for arose from the neglect of a duty owing by the shipowner to the libellant. This neglect was the neglect of a maritime duty, and attaches to the ship herself. Not only did the neglect occur upon navigable water, *but in the performance of a service necessary to be performed to enable the ship to receive her cargo.*" (Emphasis added.)

Judge Benedict thus stated the criteria which have since become the true basis for the application of the warranty.

In *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, where a longshoreman was injured when a latent defect in a shackle caused the boom to fall upon him, it was contended that because the longshoreman was engaged in loading and unloading the vessel, he could not be regarded as a seaman; this court rejected that contention and held that a longshoreman must be regarded as a seaman because of the maritime service which he performs on the vessel. After a full review of the authorities, this court stated (p. 99):

> "Running through all of these cases, therefore, to sustain the stevedore's recovery is a common core of policy which has been controlling, although the specific issue has varied from a question of admiralty jurisdiction to one of coverage under statutory liability within the admiralty field. *It is that for injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protections, regardless of the fact that he is employed immediately by another than the owner. For these purposes he is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards.*" (Emphasis added.)

Note that here again this court adopted the same criteria as Judge Benedict in *Gerrity* in applying the warranty: (1) that the injury be incurred while the vessel is in navigable waters; and (2) that the man be engaged in seaman's work.

That this concept was not to be limited to those engaged in loading and unloading of the vessel was made clear in *Pope and Talbot v. Hawn*, 346 U. S. 406. There the shipowner entered into a contract with an independent contractor for the repair of the loading equipment on the vessel. Libellant was an employee of the contractor and

was injured while engaged in the aforesaid repairs. In that case, the shipowner attempted to have the court overrule its opinion in *Sieracki*, or, in the alternative, to limit the application of *Sieracki* to the loading and unloading of vessels. This court rejected both contentions, and in so doing stated (p. 412):

> "We are asked to reverse this judgment by overruling our holding in Seas Shipping Co. v. Sieracki (US) supra. Sieracki, an employee of an independent stevedoring company, was injured on a ship while working as a stevedore loading the cargo. We held that he could recover from the shipowner because of unseaworthiness of the ship or its appliances. We decided this over strong protest that such a holding would be an unwarranted extension of the doctrine of seaworthiness to workers other than seamen. *That identical argument is repeated here. We reject it again and adhere to Sieracki.* We are asked, however, to distinguish this case from our holding there. It is pointed out that Sieracki was a 'stevedore'. Hawn was not. And Hawn was not loading the vessel. On these grounds we are asked to deny Hawn the protection we held the law gave Sieracki. These slight differences in fact cannot fairly justify the distinction urged as between the two cases. *Sieracki's legal protection was not based on the name 'stevedore' but on the type of work he did and its relationship to the ship and to the historic doctrine of seaworthiness.*" (Emphasis added.)

See also *Torres v. Kastor*, 227 F. 2d 664; *Crawford and Lucibello v. Pope & Talbot, Inc.*, 266 F. 2d 784; *Pinion v. Mission Shipping Co.*, 156 F. Supp. 654; *Pioneer v. Hall*, 227 F. 2d 262; *Imperial Oil Ltd. v. Drlik*, 234 F. 2d 4; *Lester v. U. S.*, 234 F. 2d 625; *Ronosich v. United Drydock & Repair Co.*, 67 F. 2d 377; *Read v. U. S.*, 204 F. 2d 708.

If it be conceded, as it must, that the injury occurred upon navigable waters and while petitioner was engaged in an effort designed to prepare the vessel for sea—a service which is necessary to enable the ship to discharge its maritime function—it cannot be contested but that petitioner was entitled to the benefits of the warranty of seaworthiness.

The attempted distinction between a vessel in active navigation and a vessel which is merely in navigation finds no support in the fabric of the admiralty law. In *U. S. v. Lindgren*, 28 F. 2d 725, aff'd 281 U. S. 38, the vessel, as the vessel at bar, had been laid up and repairs were being made to ready her for sea. The worker was killed while engaged in the work of preparing the vessel for sea. The late Chief Judge Parker, speaking for the court, made the following analysis (p. 728):

> "The Hybert had been laid up, it is true, but some time prior to the death of decedent she had been taken to the dry dock and was undergoing repairs preparatory to a voyage. Decedent was employed as third officer and came on duty for the first time on the morning of his death. *At the time he received the fatal injury he was engaged in preparing the vessel for sea.*
>
> "A seaman was defined by Congress in the Act of June 7, 1872, as any person employed or engaged to serve on board a vessel. R. S. Sec. 4612 (46 USCA Sec. 713). And in construing the Merchant Marine Act here under consideration the Supreme Court has held stevedores to be seamen within the meaning of the act because engaged in maritime service formerly rendered by the ship's crew. International Stevedoring Co. v. Haverty, 272 U. S. 50, 47 S. Ct. 19, 71 L. Ed. 157. In that case the court said: 'We cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a

stevedore rather than by the ship. The policy of the statute is directed to the safety of the men and to treating compensation for injuries to them as properly part of the cost of business. If they should be protected in the one case they should be in the other.'

"Certainly seamen employed to take a ship to sea *who are engaged in making her ready for the voyage are not to be denied the status of seamen and the benefit of the act merely because the vessel is not commissioned at the time.*' See The Progresso (D. C.) 46 F. 292; The William Leishear (D. C. 21 F. (2d) 862." (Emphasis added.)

See also *The Steamship Jefferson*, 215 U. S. 130 (1909); *Read v. U. S., supra; Crawford and Lucibello v. Pope and Talbot, supra; Rogosich v. Union Drydock and Repair Co., supra.*

Nor can respondent here seek any comfort from the case of *Despar v. Staived Rich Ferry Co.*, 342 U. S. 187. *In limine*, it must be noted that the issue in the *Despar* case was whether a claim for the death of a workman making repairs upon a motorboat which had been hauled completely out of the water was to be asserted under the workmen's compensation laws or under the Jones Act, and it was not whether the workman injured while on a vessel in navigable waters was entitled to the benefits flowing from the warranty of seaworthiness.

The court in holding that the employee in *Despar* was not a member of the crew of any vessel emphasized the fact that there was no vessel in navigation at that time in that the motorboats were completely out of the water having been stored on land. The court stated in this regard (p. 190): "The boats were not afloat and had neither captain nor crew."

To sum up the *Despar* case, therefore, the court held that the employee was not a seaman under the Jones Act because the vessel was not in navigable waters at the time

of the accident; it had no crew; and he was not attached to any vessel. These factors are prerequisites to the application of the Jones Act. Had the vessels involved in the *Desper* case been in navigable waters and the decedent injured while preparing the vessel for sea, the result would have been directly opposite to that reached. See *U. S. v. Lindgren, supra.*

Finally, it must be pointed out that the extent of the repairs in the case at bar is not such as to deprive petitioner of the warranty of seaworthiness. The court below found as a fact that the specifications of the repair contract required the contractor to overhaul the vessel, and this included the cleaning and repairing of water lines, the replacement of defective or missing plugs and the testing of all lines before closing and placing them in active operating condition. This kind of work and repair has never been beyond the scope of seamen's work, both at sea and in port.

The principle involved precludes any distinction between a "little" repair as against substantial repairs. However, some courts have made a distinction between substantial *structural* repairs which change the very fabric of the vessel, as against other repairs; but at this point there is a conflict in the cases. Although the facts at bar do not reach that issue, it may be helpful to briefly refer to those decisions.

In *Berge v. National Bulk Carriers*, 251 F. 2d 717, where a tanker was converted into a ship of general carriage, and the conversion required the removing of her deck, the burning out of her partitions and bulkheads, making new bulkheads and partitions and renewing the longitudinal and deck beams, Judge Murphy there stated, 148 F. Supp. 611, that this work amounted "to virtual rebuilding of the interior of the vessel."

Nor were the repairs in the instant case similar to those in the case of *Baida v. U. S.*, 153 F. Supp. 777, aff'd per cur., 252 F. 2d 117, where the court stated (p. 778):

"On July 9, 1954 the United States entered into a master contract, . . . for repair and alteration of vessels with the Bethlehem Steel Company . . . to perform *major structural repairs* on the dredge Goethels including conversion of the sump re-handling system from a bottom dump method of unloading to a pump unloading system at an approximated cost in excess of $600,000." (Emphasis added.)

On the other hand, the court below in *Read v. U. S.*, 201 F. 2d 758 (3 Cir., 1953), refused to make any distinction between structural and other repairs, and held that harbor workers engaged in all such repairs are entitled to the benefits of the warranty.

The attempt of the Court of Appeals below to distinguish its previous holding in *Read*, fails to withstand analysis. In the *Read* case, the Government transformed a Liberty type ship to a troop transport. This, of course, entailed considerable structural alteration. Yet, when a harbor worker was injured while engaged in work in one of the four deep tanks in the lower hold because of an alleged failure to provide adequate safeguards around the deep tank, the Court of Appeals held that the repairman was entitled to recover on the basis of the unseaworthiness of the vessel (p. 761):

"The Sieracki case also specifically stated that the vessel's obligation of seaworthiness extends to stevedores while working aboard the ship. In Hawn v. Pope & Talbot, Inc., 3 Cir., 1952, 198 F. 2d 800, we held that *the vessel's liability for unseaworthiness extended to a carpenter employed by one having a contract to repair the ship* as in the instant case.

"On the score of unseaworthiness we have already found that there were two or three defective lighting appliances on the main deck which the libellant and other workmen tried to use but could not. From that

testimony it is reasonable to infer that these appliances were defective at the time the ship was turned over to the subcontractor since there is no evidence that those lights had been used by anyone during the day. *Clearly then, there was here a 'failure to supply and keep in order the proper appliances appurtenant to the ship.'* The Osceola, supra.

"*We conclude, therefore, that there was a breach of the shipowner's warranty of seaworthiness.*" (Emphasis added.)

Here, the cleaning, inspecting and repairing of water lines, and the replacement of defective plugs were not such as to fall under the categories of structural changes or reconstruction of the vessel. Thus, while it is agreed that the *Read* case is distinguishable from that at bar, its basis of distinction is a favorable one to the petitioner, and does not support the conclusions reached by the Court of Appeals.

Finally, the court's reliance on *Berryhill v. Pacific Far East Lines*, 238 F. 2d 385, is misplaced. In that case the vessel was put in drydock for major repairs. The court held that the doctrine of seaworthiness did not apply, giving as the basis for its decision (p. 387):

"The Courts have recognized the distinction between the protection required by a seaman, and one who works on a ship cradled on dry land. The very reason for the rule of absolute liability ends, when the vessel is not on water."

The above decision was patently erroneous because the drydock is regarded as part of the water and within the admiralty jurisdiction and there was, therefore, no basis for such a distinction. *U. S. v. Lindgren, supra; Rogosich v. United Drydock, etc., supra.* Nevertheless, the fact that the injuries at bar occurred while the vessel was in navi-

gable waters distinguishes it in any event from the *Berryhill* case.

Further, the work involved in inspecting, cleaning and repairing of the pipes was not such as to place West within the exclusionary orbit of specialization essayed by this court in *United N. Y. and N. J. Sandy Hook Pilots Association v. Halecki*, 3 L. Ed. 2d 49.

In this case, the court below found that a plug had been loosely fitted in one of the water lines above which, when the water pressure was turned on, blew out and injured libellant. That this was an unsafe and unseaworthy condition is hardly open to dispute. That petitioner was a beneficiary of the warranty of seaworthiness is clear, for his injury occurred on navigable waters, while he was engaged in the service of the vessel. If one of the officers who constituted the crew of the "Mary Austin" had been struck by this very plug instead of petitioner, there could be no question but that he would have recovered under the warranty of seaworthiness, and it must follow that petitioner has an equal right to recover under those circumstances. The court below, therefore, clearly was in error in holding that the warranty of seaworthiness did not apply in this situation.

Point Four: Respondent Is Liable Under Theories of Unseaworthiness for Failing to Provide Petitioner With a Safe Place to Work.

The learned court below correctly stated that respondent was under a duty to provide petitioner with a safe place to work, and that this duty was a non-delegable one; however, the court stated further that this duty was not an absolute one but was related to negligence and was tempered by the requirement of reasonable care in place of the absolute duty under the warranty.

This qualification of the shipowner's duty does violence to the established rule of maritime law that the duty to pro-

vide a safe place to work is both absolute and non-delegable. The pertinent maritime principle was considered by the Court of Appeals for the Sixth Circuit in *The Scandbec*, 102 F. 2d 577, where the court stated (p. 581):

> "It is the duty of a shipowner or master to supply a seaworthy vessel for its employees and *this does not depend on the exercise of reasonable care, but is absolute*. The H. A. Scandrett, 2 Cir., 87 F. 2d 708. A seaman does not assume the risk of injury even from obvious dangers if the proximate cause thereof is the failure of the shipowner or master to supply and keep in order proper appliances appurtenant to the ship and *the same rule applies for failure to provide a safe place in which to work*. Cleveland Cliffs Iron Company v. Martini, 6 Cir., 96 F. 2d 632; Socony-Vacuum Oil Company v. Smith, 305 U. S. 424, 59 S. Ct. 262."

This court in *Mahnich v. Southern Steamship Co.*, 321 U. S. 96, stated in this connection (p. 102):

> "In thus refusing to limit, by application of the fellow servant rule, the liability of the vessel and owner for unseaworthiness, this Court was but applying the familiar and then well established rule of non-maritime torts, that the employer's duty to furnish the employee with safe appliances and a safe place to work, is non-delegable and not qualified by the fellow servant rule."

See also *Pacific Far East Lines v. Williams*, 234 F. 2d 378, and *Poignant v. U. S.*, 225 F. 2d 595, where the late Judge Frank, in a concurring opinion stated (p. 603):

> "The Third Circuit has since interpreted its Cookingham 'transitory' doctrine to mean that the ship's liability for a 'transitory' object depends upon the length of time during which the object was not removed. See Crawford v. Pope & Talbot, Inc., 3 Cir., 206 F. 2d

784, 789, 790. I understand that my colleagues repudiate that thesis. The Third Circuit, in a still later case, explaining the Cookingham doctrine, has said that it turns on a distinction between (a) the duty to provide a seaworthy ship, which is absolute, and (b) the duty to provide a safe place to work, which, so that court holds, demands reasonable care only. See Brobazon v. Belships Co., 3 Cir., 202 F. 2d 904, 906. *I think that distinction directly at odds with the Supreme Court's decisions. I read my colleagues' opinion as repudiating it also.*" (Emphasis supplied.)

Since the court below found that the plug in the pipe had been loosely fitted and catapulted out when the water pressure was negligently turned on, it follows that respondent failed to provide petitioner with a safe place to work. In *Cranmer v. Joachim Hendrik Fisser*, 3 L. Ed. 2d 413, where the safety cut off device on the winch was set at twice the tunnage limit of the winch rigging, and the negligence of the stevedore in the placing of the booms brought the unseaworthy condition of the vessel into play, it was stated by this court, at page 417:

"The shipowner is not relieved of these responsibilities by turning control of the loading or unloading of the ship over to a stevedore company. It was held in Grillea v. United States (CA 2 NY) 232 F. 2d 919, that stevedores themselves could render a ship pro tanto unseaworthy and make the vessel owner liable for injuries to one of them. And see Rogers v. United States Lines, 347 U. S. 984, 98 L. ed. 1120, 74 S. Ct. 849; Alaska S. S. Co. v. Petterson, 347 U. S. 396, 98 L. ed. 798, 74 S. Ct. 601. We need not go so far to sustain the District Court here. For there is ample evidence to support the finding that these stevedores did no more than bring into play the unseaworthy condition of the vessel. The winch — an appurtenance of the vessel — was not inherently defective as was the rope in

> the Mahnich Case. But it was adjusted by those acting for the vessel owner in a way that made it unsafe and dangerous for the work at hand.
>
> That was the theory of the District Court; it correctly applied the concept of unseaworthiness. . . ."

It is now clear since this court's decision in *Cranady* that the unsafe condition brought into play by the negligence of the independent contractor makes the shipowner liable under the warranty.

Point Five: The Shipowner Is Liable Under Theories of Negligence in Failing to Provide a Safe Place to Work and to Warn of the Dangerous Condition.

Putting to one side the absolute duty of the shipowner to supply petitioner with a safe place to work, and analyzing the facts at bar in terms of due care and non-delegability, still the respondent is liable for the injury suffered by the petitioner.

The learned court below held that the "Mary Austin" was delivered to the independent contractor with its water tanks and pipes completely drained. The court further opined that nothing in the condition of the vessel as it then stood could have caused the petitioner's injuries, but that only the exertion of the external force produced the injuries sued upon. That external force, of course, was the placing of water in the pipes along with the normal amount of pressure resultant therefrom. This force was supplied by the contractor. Accordingly, the court held that the accident was caused by the positive, *negligent* act of a fellow employee of petitioner, and that the shipowner was not liable for such conduct.

There is no question but that the loose plug created an unsafe condition, albeit a latent one, for it is obvious that it was not fit for the purpose for which it was intended.

The duty to supply a business invitee with a safe place to work is a non-delegable one. *Vanderlinden v. Lorentzen*,

139 F. 2d 995 (2 Cir., 1944); *Amato v. U. S.*, 167 F. Supp. 929; *Palazzolo v. Pan Atlantic S. S. Co.*, 211 F. 2d 277. The court below found that the contractor was negligent in turning on the water. Thus, the negligent act of the contractor in turn acted upon the preexisting latent dangerous condition, thereby creating a patent one resulting in the injury. It might be noted that this is not a case where the injury-causing negligence was merely an incident in a continuous operation. Of course, the accident would not have occurred were it not for the negligence of the contractor in turning on the water; likewise, it would not have occurred were the plug properly fitted. In this regard, this factual situation is comparable to that in *Cranaday v. Joachim Hendrik Fisser, supra*. In that case a preexisting dangerous condition was brought into play by the negligent act of the longshoremen, and the court held that under the shipowner's absolute non-delegable duty to supply a safe place to work, the shipowner was liable not only for its passive unseaworthiness but for the active negligence of the stevedoring contractor.

Assuming for this purpose that recovery under the theory of unsafe place to work differs from that of unseaworthiness, in that in the former you must prove a lack of due care and in the latter there is absolute liability, this requisite was supplied by the contractor's negligence. Certainly, under the theory of non-delegability, the shipowner cannot escape liability because the negligent action of another brought into play a preexisting dangerous condition. If the non-delegable aspect of the duty to supply a safe place to work has any meaning whatsoever, it cannot permit a shipowner to delegate a job to a contractor under circumstances such as exist at bar, and thereby insulate itself from liability because the contractor supplies the positive element to a preexisting dangerous condition. If an unsafe condition is created, the shipowner must stand responsible, regardless of how it is created. However, in the case at bar, we need not go so far. It would not be unreasonable

to say that the government anticipated that the water pressure would necessarily have to be turned on. It knew or had reason to know that the plugs were loose. Knowing that the vessel had been in mothballs for an extensive period of time and recognizing that the ship had been built for use in World War II, the shipowner was charged with the knowledge of the extreme hazard which would be created as a result of the water pressure and the loose plug. Under such circumstances, the shipowner breached its obligation to West. As was stated in *Halecki v. United N. Y. and N. J. Sandy Hook Pilots Assn.*, 251 F. 2d 708, aff'd in part 3 L. Ed. 2d 49 (1959), where a harbor worker was killed as a consequence of inhalation of carbon tetrachloride fumes, with which chemical he was spraying the generators of the ship being overhauled in a New Jersey Shipyard, the court of appeals found that the shipowner was charged with the knowledge that carbon tetrachloride was to be used in a confined space, and stated at F. 2d p. 711:

> "The deceased was certainly an 'invited person,' or 'business guest,' and the shipowner was liable, not only for the negligence of the master, but, although the work was let out to a subcontractor, also for any lack of 'reasonable care' to ascertain the methods and manner in which the concessionaire or independent contractor carries on his activities, not only at the time when the concession is let, or the contractor employed, but also during the entire period in which the concessionaire or contractor carries on his activities."

See also *Aldridge v. States Marine Corp. of Delaware*, 265 F. 2d 708 (9 Cir., 1959), where a longshoreman was killed because of the dangerous manner in which the longshoremen were "breaking out" drafts of cargo, and that court found that the dangers involved should have been known to the ship's officers. And see Restatement of Torts, Vol. 2, Sec. 344, Comment b.

The shipowner's duty, as based upon theories of negligence alone, apart from any liability under the warranty, is non-delegable in the use of due care under the circumstances, and this shipowner becomes responsible for any lack of due care; whether that lack be directly attributable to him or to anyone for whose conduct he is responsible under his non-delegable duty. Accordingly, the finding of the court below that the shipowner exercised reasonable care and supplied petitioner with a safe place to work is clearly erroneous.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1959

EDGAR ALLEN WEST, PETITIONER

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF COMMERCE, MARITIME ADMINISTRATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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EDGAR ALLEN WEST, PETITIONER

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UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF COMMERCE, MARITIME ADMINISTRATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania (R. 8-20) is reported at 143 F. Supp. 473. The opinion of the Court of Appeals for the Third Circuit (R. 135-139) is reported at 256 F. 2d 671.[1]

[1] The original opinion of the Court of Appeals remanding the case for more precise findings (R. 129-131) is reported at 246 F. 2d 443. The order of the District Court upon remand, amending its findings of fact (R. 131-132), is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 2, 1958 (R. 139). On September 9, 1958, Mr. Justice Brennan entered an order extending the time for filing a petition for a writ of certiorari in this case until November 29, 1958 (R. 140). The petition for a writ of certiorari was filed on November 28, 1958, and granted on March 2, 1959 (R. 140; 359 U.S. 924). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the courts below correctly declined to permit recovery against the shipowner of a deactivated vessel for an alleged breach of a warranty of seaworthiness in a suit brought by a shoreside marine engineer, employed by the ship repair contractor, where at the time of the injury the vessel was completely out of navigation and docked at a pier for reactivation repairs and where the shore-based worker was engaged in the performance of major repairs on the vessel and was injured by an article which was among the items specified to be inspected, tested, and repaired by the ship repair contractor.

2. Whether the courts below correctly determined that the shipowner was not negligent in the circumstances of this case.

STATEMENT

This action, filed pursuant to the Public Vessels Act, 46 U.S.C. 781, *et seq.*, was instituted by petitioner by a libel *in personam* against the United States as owner of the liberty ship, S.S. MARY AUSTIN (R. 2-6). The libel sought damages for injuries sustained during petitioner's employment on the MARY AUSTIN and was es-

sentially based on the allegations that the vessel was unseaworthy and that employees of the United States had been negligent (R. 4-5). The United States answered the libel generally denying the allegations of unseaworthiness and negligence (R. 6-8); in turn, relying on an express indemnification clause in the repair contract, the United States impleaded the reactivation repair contractor, petitioner's employer, Atlantic Port Contractors, Inc. (R. 121-124).

The undisputed basic facts, as established by the findings of the District Court which were upheld on appeal by the Court of Appeals, are as follows:

Sometime after the cessation of hostilities in World War II, the liberty ship, S.S. MARY AUSTIN, was completely deactivated by the United States and placed in the "moth ball fleet" located in the James River at Norfolk, Virginia (R. 9). An important step in the total deactivation process was the draining of all water pipes, boilers, and tanks (R. 9). At the time of deactivation and on periodic occasions thereafter, a special oil preservative was run through the water system to prevent it from rusting, and the pipes, boilers, and tanks were kept completely free of water (R. 9, 86).

In 1951, the MARY AUSTIN was ordered reactivated and placed in active service once again (R. 9). In order to prepare the vessel for seagoing use after years in a laid-up status, surveys of the MARY AUSTIN were conducted both by government employees and employees of contractors specializing in repair, alteration, conversion, or reconditioning of merchant vessels to ascertain the work necessary to put the MARY AUSTIN in service again and to prepare detailed specifications of items requiring repair, reconditioning, or replacement

(R. 9). On February 5, 1951, Atlantic Port Contractors was designated the successful bidder by the Government and awarded the contract to reactivate the MARY AUSTIN according to the detailed specifications included in the contract (R. 9, 121-22).

Under the terms of the contract, Atlantic was required to undertake a complete reactivation and overhaul of the MARY AUSTIN, including major repairs in all parts of the vessel (R. 9, 78, 138). As only one indication of the extent of the rehabilitation work, the vessel was to have all its machinery and parts "opened up" and placed in safe working condition (R. 78-81). With regard to the water system of the ship, drained and empty since the MARY AUSTIN was placed in the "moth ball fleet", detailed specifications instructed the repair contractor that thorough repair and refurbishing of the entire system was necessary (R. 9, 78-81). In these specifications, the contractor was informed that the entire water system had been opened for drainage and that the contractor was expected to clean and repair all water lines and to repair or replace all defective or missing plugs and other parts of the water system, prior to testing out the system and proving it "tight and ready for service" (R. 9, 80-81).

The contract also provided that the vessel was to be delivered to the repair contractor and that Atlantic was to have complete responsibility and control as to the manner and methods of repair (R. 9, 19). The Government reserved only a bare right to inspect the work and materials to insure compliance with contract specifications, but Atlantic alone had control over the manner of performance by its employees and the scheduling and progress of all phases of the reactivation (R. 9-10, 19). In addition, under the express terms

of the contract, Atlantic agreed to provide a safe place to work for its employees and to indemnify the United States for any liability for personal injuries stemming from "the fault, negligence, wrongful acts or omissions" of Atlantic (R. 10).

The MARY AUSTIN, a completely deactivated and dead ship, was towed to Philadelphia, Pennsylvania, and delivered to the repair contractor on November 5, 1951 (R. 10). From that date until the reactivation was completed on December 11, 1951, some five weeks later, the vessel was docked at a pier in Philadelphia where the repairs were made (R. 10). During this time, seven employees of the United States Lines Company,[2] were assigned to the vessel (R. 10). They signed no Shipping Articles during the repair period (R. 10). The District Court found that they had no "control of the ship in the ordinarily accepted context" and that their principal function aboard was to serve as an inspection team for the shipowner to make certain, on the shipowner's behalf and according to the terms of the contract, that Atlantic's work, when completed on any one of the numerous specifications, conformed to specification requirements (R. 10-11). Each of these men was instructed not to interfere with the work or manner of work of Atlantic's employees, and, in fact, no such interference took place (R. 11).

The injuries for which petitioner brought suit resulted from an accident aboard the MARY AUSTIN on the morning of November 21, 1951, while the vessel was undergoing major repairs and reactivation at Atlantic's pier in Philadelphia (R. 11). Petitioner, who

[2] The MARY AUSTIN, while owned by the Government, was husbanded for its account during this period by the United States Lines Company, under a General Agency Agreement (R. 8).

had been assigned to work by Atlantic as a marine engineer (R. 9), was engaged in work on the main engine, and, at the moment of the accident, was working inside the low-pressure cylinder of that engine which was completely stripped down (R. 11, 25). He was injured when struck on the left knee by a small metal plug which was forced out of an overhead water pipe when a fellow employee of the repair contractor (Atlantic), ostensibly engaged with a group of pipefitters in repairing the water system, unexpectedly turned on the water[4] (R. 11, 18-19, 136, 131-132).

The District Court ruled that the United States was not liable either on the ground of breach of a warranty of seaworthiness, or of negligence (R. 8-20). With respect to the former, the District Court, fully cognizant of the standard of liability established in this Court's decisions in *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, and *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, concluded that there was no justification for ex-

[4] In its finding of fact number 8, the District Court noted that petitioner had, at the time of the accident, accused a number of his fellow employees of having dropped the plug on him (R. 11). The District Court concluded that the plug had either (1) fallen from one of the pipes or tanks, or (2) been dropped by an Atlantic workman (R. 11). Upon remand to ascertain which of these two possibilities was the probable cause (R. 129-131), the District Court added to finding number 8 that petitioner had established "by a bare preponderance of the evidence" that he was struck by a fallen plug and that this plug fell through the negligence of Atlantic's employees in forcing water through the pipes (R. 131-133, 18-20). The court observed in this connection (R. 18-19):

> That loosely fitted plugs might be present and not able to withstand the application of pressure is certainly not surprising. That very fact was one of the reasons that the ship was being repaired and whatever precautions should have been taken when water was first placed into the lines should have been taken by Atlantic.

tending the *Sieracki* doctrine to cover work performed on a vessel not represented or warranted as seaworthy for a voyage but as completely withdrawn from navigation (R. 17). Nor did the trial court consider the reach of the *Sieracki* warranty of seaworthiness to apply to the situation here of a worker engaged in major reactivation repairs closely approximating "home port structural repairs" (R. 16-18). Moreover, noting that the defective loose plug which caused the injury upon the introduction of water pressure into the pipes by Atlantic's employees was an item generally listed in the specifications as needing testing and repair, the District Court considered it anomalous to imply a warranty of "seaworthiness" to this item and ruled that the MARY AUSTIN was reasonably fit, and hence, "seaworthy", for the intended purpose of reactivation repairs (R. 13, 18-19).

As to negligence, the trial court, observing that the shipowner had the nondelegable duty of using reasonable care to provide petitioner with a safe place to work, held that the United States had fulfilled that duty in the circumstances of this case (R. 18-19). Of crucial significance (in the court's view) on this question was both the fact that defective water system plugs were specifically pointed out for repair and replacement in the contract specifications and the related circumstance that the repair contractor (Atlantic) alone had complete control over the methods of repair utilized by its employees (R. 18-19). Finally, finding no liability on the part of the United States, the court held that it was unnecessary to consider the issue of indemnification presented by the third-party action against the repair contractor (R. 15, 19), but noted in passing that, had the United States been held liable, it would have been

entitled to indemnification from Atlantic[4] (R. 19-20).

On petitioner's appeal to the United States Court of Appeals for the Third Circuit, that court affirmed, holding that the United States was liable neither for breach of a warranty of seaworthiness nor for negligence (R. 135-139).[5] Upholding the District Court on the first of these two issues, Judge Goodrich, speaking for the court, emphasized both the fact that the situation here, unlike *Sieracki* or *Pope & Talbot*, involved a ship which was out of navigation and, in addition, a vessel undergoing, and a worker engaged in making, major repairs. The court considered analogous and persuasive the recent decisions of the Ninth Circuit in *Berryhill* v. *Pacific Far East Line*, 238 F. 2d 385, certiorari denied, 354 U.S. 938, of the Second Circuit in *Berge* v. *National Bulk Carriers Corp.*, 251 F. 2d 717, certiorari denied, 356 U.S. 958, and of the Fourth Circuit in *Raidy* v. *United States*, 252 F. 2d 117, certiorari denied, 356 U.S. 973. The Court of Appeals also upheld the District Court's findings that the United States had exercised reasonable care in providing a safe place to work and thus was not liable on the alternative allegation of negligence.

[4] Thus the trial court's dismissal of the third-party action was obviously a dismissal without prejudice. In the event that this Court were to reverse the decision exonerating the United States from liability, it would become necessary for the District Court upon remand to reconsider the third-party action, and the mandate from this Court should so direct.

[5] Affirming, *per curiam*, and adopting the opinion of the District Court in 153 F. Supp. 777.

SUMMARY OF ARGUMENT

I

The courts below properly declined to permit recovery by petitioner on the ground of the vessel's alleged breach of warranty of seaworthiness.

A. Fully cognizant of the extension of the warranty of seaworthiness to shore-based workers in *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, and subsequent decisions of this Court, the courts below were equally cognizant of the fact that those decisions dealt only with work performed on a vessel in navigation and represented by the shipowner as warranted seaworthy for a voyage. Petitioner's injury aboard the MARY AUSTIN, however, was sustained while he was engaged in major repairs on a vessel which was completely withdrawn from navigation and was being reactivated for seagoing use after years in the Government's "moth ball fleet" of World War II liberty ships. In these circumstances, there are neither historical nor other considerations justifying the extension of the shipowner's burden of absolute liability from vessels warranted ready for sea and for loading and unloading in port to those, like the MARY AUSTIN here, which, as "dead hulks", are not represented or warranted to be seaworthy but are out of navigation undergoing complete renovation for the very purpose of ensuring future seaworthiness.

B. The major extent of repairs on the MARY AUSTIN, moreover, during its five week reactivation at the repair contractor's pier affords a separate if related basis for refusing to find any representation or warranty of seaworthiness. Under this Court's *Sieracki* decision, the warranty of seaworthiness is made

to shore-based workers only if they are doing the work traditionally done by seamen. Judge Learned Hand early noted in *Guerrini* v. *United States*, 167 F. 2d 352 (C.A. 2), certiorari denied, 335 U.S. 843, that home port structural repairs had never been undertaken by the ship's company. And in such recent decisions as *Berghill* v. *Pacific Far East Line*, 238 F. 2d 385 (C.A. 9), certiorari denied, 354 U.S. 938; *Raidy* v. *United States*, 252 F. 2d 117 (C.A. 4), certiorari denied, 356 U.S. 973, and *Beroi* v. *National Bulk Carriers Corp.*, 251 F. 2d 717 (C.A. 2), certiorari denied, 356 U.S. 958, it has been consistently held that the *Sieracki* warranty of seaworthiness does not apply to any part of the general performance of major repairs on a vessel. The District Court below found that the repairs on the MARY AUSTIN were tantamount to "home port structural repairs" (R. 17), and the Third Circuit considered them similar to the major repairs involved in *Berghill*, *Raidy* and *Beroi*, *supra* (R. 138-139). These findings, essentially uncontradicted by petitioner either below or here, preclude application of the *Sieracki* concept of a warranty of seaworthiness; if that is not so, we submit that that doctrine will know no limits and will be as applicable to the construction of a new vessel as to the major reactivation of an old.

C. Even if this Court were of the view that the seaworthiness warranty extends to the MARY AUSTIN despite its status as a vessel warranted out of navigation and undergoing major reactivation repairs, the decisions below are nonetheless correct since there has been no breach of warranty. Petitioner was injured upon being struck by a water line plug while working on the main engine of the vessel when others of the independent contractor's employees negligently turned on

the water in an "opened-up" water system, forcing the loose plug to fall. The United States, however, had left no doubt about the defectiveness of the water system. On the contrary, its condition was known to be one of the reasons the vessel was brought in for repair, and the repair contract most specifically pointed to defective and missing water line plugs, and the necessity for testing out the entire system and repairing and replacing defective plugs before the water system could be ready for service. To conclude that the vessel had warranted the loose plug which struck petitioner as seaworthy would be to ignore the obvious and crucial specifications of the repair contract. The only reasonable conclusion here is either, as the District Court ruled (R. 20), that the water system was warranted reasonably fit only for the intended purpose of repair, and, hence, was "seaworthy" only for that purpose, or, as some courts have viewed it, that it is simply anomalous to include parts of a vessel represented in need of repair in a warranty of seaworthiness. In either view, the plugs of the water system of the MARY AUSTIN, designated for repair, cannot be considered unseaworthy in petitioner's case.

II

The courts below also correctly denied petitioner's claim based on the alleged failure of the United States, as shipowner, to provide him with a safe place to work. The duty of the shipowner to provide a reasonably safe place to work is, of course, measured by negligence standards of ordinary care in the circumstances. *United Pilots Assn.* v. *Halecki*, 358 U.S. 613, 618-619; *The Tungus* v. *Skovgaard*, 358 U.S. 588. That the Govern-

ment did not breach its duty to petitioner in this regard is made abundantly clear by the findings of the District Court exonerating the vessel from negligence. Two critical findings are conclusive on this issue. First, as already indicated, the vessel clearly revealed in the repair contract with Atlantic, petitioner's employer, that there were missing and defective water line plugs which must be tested and repaired before the water system could be used. Second, the contract also specified that the repair contractor was to have complete control over the method and scheduling of repairs, and while the vessel could have an inspection team aboard to check completed items, that team had no right to interfere in any way with the repair work. Hence, everything that could have been done by the Government in providing petitioner with a safe place to work was done, and the negligence involved was solely that of the repair contractor's employees in turning on the water. Petitioner's argument on this issue is really grounded on the incorrect premise that the Government is an insurer against any accident whatever on the vessel. The courts, however, have consistently refused to impose such a burden on a vessel. *E.g., Lyon* v. *United States*, 163 F. Supp. 206 (E.D. N.Y.), affirmed, 265 F. 2d 219 (C.A. 2); *Filipek* v. *Moore-McCormack Lines*, 258 F. 2d 734 (C.A. 2), certiorari denied, 359 U.S. 927; *Phipps* v. *N.V. Nederlandsche Amerikaansche S., M.*, 259 F. 2d 113 (C.A. 9).

Finally, and aside from the shipowner's freedom from negligence in this case, it is doubtful in any event that petitioner may take advantage of the safe place to work doctrine "where the prosecution of the work itself makes the place and creates the danger". *Filipek*, *supra*, at 737.

ARGUMENT

I

The Courts Below Properly Declined to Permit Recovery in This Case on the Ground of Breach of Warranty of Seaworthiness.

A. *The Warranty of Seaworthiness Does Not, and Should Not, Apply to a Vessel Which Is Not in Navigation.*

1. *This Court's decisions applying the warranty of seaworthiness cover only work on a vessel represented as seaworthy for a voyage.* In its decision in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, this Court extended the protection afforded by the shipowner's absolute warranty of a seaworthy ship to include longshoremen and other shore-based workmen, employed by independent special contractors, when engaged in work incident to the loading or unloading of the vessel in the course of its voyage. The rationale of this extension beyond shippers, passengers and seamen, who are in privity of contract with the shipowner, is that the shoreworkers, while not in privity with the owner, are equally within the representation of the vessel as seaworthy for the voyage. Moreover, the Court held that loading and unloading, the work involved in *Sieracki*, were part of the voyage and "Historically the work * * * of the ship's service, performed until recent times by members of the crew" (328 U.S. at 96).[6]

[6] This factual premise is sharply disputed in Tetreault, *Seamen, Seaworthiness and the Rights of Harbor Workers*, 39 Cornell L.Q. 381, 412-418 (1954). A scholarly analysis of the doctrine and its evolution is found in Chief Judge Magruder's recent opinion in *Mitchell v. Trawler Racer, Inc.*, 265 F. 2d 426 (C.A. 1); see also Binlow, *Seaworthiness and Seamen*, 9 Miami L.Q. 418 (1955). Comment, *Overlapping Remedies for Injured Harbor-workers: Interaction on the Waterfront*, 67 Yale L.J. 1205, 1241-1244 (1958).

Hence, the Court concluded that the shipowner could not escape the consequences of his traditional representation of the vessel as seaworthy for the voyage by parcelling out to intermediary employers services incident to its navigation which were traditionally performed by seamen. "For these purposes he [the longshoreman] is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards" (328 U.S. at 99).[7]

In subsequent decisions, involving loading or unloading in the course of a voyage, this Court has reaffirmed its *Sieracki* conclusion. In *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, a shore-based carpenter whose work involved the repair of a "slight defect" in the vessel's loading equipment, and who "was put to work on it so that the loading could go on at once" (*id.* at 413), was held to be entitled to recover on the ground of breach of warranty of seaworthiness. Again, in *Alaska Steamship Co. v. Petterson*, 347 U.S. 396, the Court affirmed, *per curiam* and without opinion, a decision of the Ninth Circuit[8] granting the protection of the warranty of seaworthiness to a longshoreman injured by a breaking block while engaged in loading the vessel for a voyage. And in *Rogers v. United States Lines*, 347 U.S. 984, the Court held, again *per curiam* and without opinion, that a longshoreman unloading

[7] The Court found further support for its result in "the trend and policy" (328 U.S. at 97) of its prior decisions in which longshoremen loading and unloading vessels were treated as "seamen" and thus conferred rights of recovery under the Jones Act (*International Stevedoring Co. v. Haverty*, 272 U.S. 50); and in which injury to a longshoreman was classified as a marine tort and thus considered within the admiralty jurisdiction. *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52.

[8] *Petterson v. Alaska Steamship Co.*, 205 F. 2d 478.

at the voyage end was equally within the warranty. Finally, in two decisions last term, the Court held that the warranty applied in favor of a longshoreman in one case, and a repairman in the other, both of whom were involved either directly in unloading, or, as in *Pope & Talbot*, in repairing machinery to permit loading or unloading to continue. *Cramaty* v. *The Joachim Hendrik Fisser*, 358 U.S. 423; *The Tungus* v. *Skovgaard*, 358 U.S. 588, 595.

Thus, in each of the cases in which this Court has applied the warranty of seaworthiness to non-members of the ship's company, it is plain that the vessel was in navigation on a voyage and was represented by her owner as being seaworthy for that purpose. The work performed by the particular employee in each case was directed to the immediate carrying out of the ship's voyage; in *Sieracki*, *Patterson*, *Rogers*, and *Cramaty*, there was loading or unloading of the vessel in the execution of her voyage, and in *Pope & Talbot* and *Skovgaard*, the performance of work related inextricably to loading or unloading in connection with the voyage. In none of these cases had the vessel been completely withdrawn from navigation for a period of years, as in the instant case, and subsequently been in the process of reactivation for the specific purpose of making it seaworthy for future voyages.[10] On the contrary, the vessels were in active navigation on their voyages; they were held out by their owners as being in all respects

[9] Reversing 205 F. 2d 57 (C.A. 3).

[10] The crew member cases similarly involved only the warranty of the vessel's seaworthiness for a voyage. *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96; *Carlisle Packing Co.* v. *Sandanger*, 259 U.S. 255. Cf. *The Osceola*, 189 U.S. 158, 175, and see Smith, *Liability for Injuries to Seamen*, 19 Harvard L.R. 418, 422-424 (1906).

in a seaworthy condition for their voyages; and this Court recognized that those who were doing the work of seamen and were related to the ship in the same way as seamen "who had been or were about to go on a voyage" (*Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. at 413) were entitled to rely, like crew members, on the owner's implied representation or warranty of the vessel's seaworthiness for their respective voyages.[11]

2. ***There is no justification for extending the Sieracki doctrine to cover work performed on a vessel while it is not represented as seaworthy for a voyage but is out of navigation.*** This Court and other federal courts have consistently recognized the distinction between the legal situation of a seaman working on a vessel in navigation on a voyage, and one who works on a vessel which has been removed from navigation.[12] For example, in *Desper* v. *Starved Rock Ferry Co.*, 342 U.S. 187, relied on by both courts below (R. 17-18, 137-138),

[11] In another illustration of this same point, the Court refused to extend the protection of the warranty to a shore-based repairman fatally injured while cleaning a vessel's generators with carbon tetrachloride. *United Pilots Assn.* v. *Halecki*, 358 U.S. 613. The Government filed a brief as *amicus curiae* in that case, and urged, as here, that recovery for unseaworthiness be denied since the vessel involved was not in navigation and hence not warranted seaworthy for a voyage. The Court denied recovery on the ground that, under *Sieracki*, the shore-based worker was not doing work traditionally done by seamen, and considered it unnecessary to "reach the question" of whether such a warranty was made as to a vessel not in navigation. *United Pilots Assn.* v. *Halecki*, 358 U.S. 613, 617.

[12] The fact that the MARY ALICE was in navigable waters while it was undergoing reactivation after years in laid-up status in the "mothball fleet" does not, of course, make it a ship in navigation. *See Bobby* v. *Whitcomb*, 356 U.S. 271. Petitioner's argument that the MARY ALICE was a ship in navigation (Br., pp. 5-9) completely ignores the crucial factor that this issue is ordinarily a question of fact not of law. Both courts below found that the MARY ALICE was a ship out of navigation (R. 17, 137-138).

the Court passed upon the question of whether one doing seasonal repair work on a boat after the end of its navigation continued to be a "seaman" within the meaning of the Jones Act.[13] The decedent, Desper, had been employed during the summer months as an operator or seaman of one of a fleet of motorboats carrying sightseers. This employment had been terminated and thereafter he had helped to lay up the boats for the winter. He was then reemployed in the spring and was injured while helping to paint, clean, and waterproof the boats in preparing them for navigation. At the time of the injury, none of the boats was afloat, nor did they have a captain or crew. The Court concluded that, "while engaged in such seasonal repair work Desper was not a 'seaman' within the purview of the Jones Act. The distinct nature of the work is emphasized by the fact that there was no vessel engaged in navigation at the time of the decedent's death. All had been 'laid up for the winter.'" *Id.* at 191. See also, *Antus* v. *Interocean S.S. Co.*, 108 F. 2d 185 (C.A. 6); *Hawn* v. *American S.S. Co.*, 107 F. 2d 999 (C.A. 2); *Seneca Washed Gravel Corporation* v. *McManigal*, 65 F. 2d 779 (C.A. 2); *Gonzales* v. *United States Shipping Board*, 3 F. 2d 168 (E.D. N.Y.).

As the courts below perceived, there is no sound distinction between the status of the vessels in the *Starved Rock Ferry Co.* case and the status of the MARY AUSTIN in the instant case. The vessel here had been laid up for years in the "moth ball fleet" of World War II liberty ships, and was undergoing a

[13] It will be remembered, *supra*, fn. 7, p. 11, that the Court, in *Starved*, found support for its conclusion that the longshoreman was there to be regarded as a "seaman", in another Jones Act case, *International Stevedoring Co.* v. *Haverty*, 272 U.S. 50

thoroughgoing reactivation as a necessary prerequisite to any contemplated use in navigation. The warranty or representation was that it was *not* seaworthy for a voyage. The repair work being performed was not an incident of a current voyage as in *Pope & Talbot, Inc. v. Hawn, supra*, 346 U.S. at 413, or *The Tungus v. Skovgaard, supra*, 358 U.S. at 589. The reactivation of the MARY AUSTIN was completely undertaken and under the control of groups of the contractor's employees, and the only representation of the shipowner on board during this period was accorded by employees serving as an inspection team to see if completed repair jobs conformed to contract specifications. In these circumstances, we submit, petitioner was no more a "seaman" to whom a warranty of "seaworthiness" was made than was the worker, Desper, in the *Starved Rock Ferry* case for the purposes of Jones Act recovery.

Although, as we show *infra*, p. 19 *ff.*, the lower court decisions have been primarily concerned with such factors as the type of work and the extent of the repair job, they have also recognized, either in express terms or implicitly, that whether a vessel is out of navigation at the time of injury is an important consideration in determining whether there was any warranty of its seaworthiness. Thus, in *Union Carbide Corp. v. Coull*, 256 F. 2d 449 (C.A. 4), pending on writ of certiorari No. 3, this Term, a repairman was drowned when he fell into the water from a barge which was not in ordinary operation but was moored at his employer's repair yard, and the vessel was claimed to be "unseaworthy" because not equipped with life saving equipment. The court held that the vessel had been "withdrawn from navigation" and "the warranty of seaworthiness does not apply in that situation" *Id.* at

455). Similarly, in *Raidy* v. *United States*, 153 F. Supp. 777 (D. Md.), affirmed, *per curiam*, 252 F. 2d 117 (C.A. 4), certiorari denied, 356 U.S. 973, the courts refused to extend the warranty of seaworthiness to a repair situation similar to that here, in part because the "ship at the time was not subjected to any perils of navigation" and "had necessarily been withdrawn from navigation for a long period" (252 F. 2d at 118). See also, *Berryhill* v. *Pacific Far East Line*, 238 F. 2d 385, 387 (C.A. 9), certiorari denied, 354 U.S. 938.

In our view, these decisions, like those below, properly interpret this Court's application of the *Sieracki* doctrine to be limited to vessels in navigation, and consequently warranted as fit for a voyage. The MARY AUSTIN held no such status at the time of petitioner's injury, and thus extension of the *Sieracki* rule and standard to this case is unjustified.

B. *The Warranty of Seaworthiness Does Not, and Should Not, Apply to the Performance of Major Repairs on a Vessel*

As we have noted in Point I, A, *supra*, pp. 13-16, each of the pertinent decisions of this Court, from *Sieracki* to *Cromady*, has applied the seaworthiness warranty to loading or unloading of vessels in navigation, or to minor repairs inextricably related to such loading or unloading. It has never been suggested in any of these decisions, or those of the lower federal courts interpreting the *Sieracki* doctrine, that the warranty applies in the situation of major repairs to a vessel, either in dry-dock or, as here, berthed at the repair contractor's pier, where the vessel is in fact represented not to be seaworthy for a voyage. On the contrary, the decision of the Third Circuit below, holding that the major re-

activation of the MARY AUSTIN was not work covered by a warranty of seaworthiness, accords with and was expressly predicated on consistent holdings in other courts of appeals subsequent to this Court's decision in *Sieracki*. Thus, completely aside from the question of whether the warranty applies to a vessel withdrawn from navigation discussed *supra*, the major reactivation of the ship, tantamount in the District Court's view to "home port structural repairs" (R. 17), affords a separate and independent basis for affirming the decision below.[13]

In the first of these lower court decisions subsequent to *Sieracki*, the Ninth Circuit had occasion to consider whether the warranty applied to a worker engaged, like petitioner here, in repairing machinery aboard a vessel on which major or "general" repairs were being performed. *Berryhill* v. *Pacific Far East Line*, 238 F. 2d 385, 387, certiorari denied, 354 U.S. 938.[14] While

[13] It is true that, as with many of the variant factors applied by the courts in applying the *Sieracki* standard to ever-varying factual patterns, consideration of the factors of "in or out of navigation" and of "extent of repairs" tend to coalesce. *See, e.g., Berryhill* v. *Pacific Far East Line*, *supra*, 238 F. 2d at 387; *Reed* v. *United States*, *supra*, 252 F. 2d at 118. Thus, a vessel, like the MARY AUSTIN, on which major repairs are being performed, is customarily dry-docked or berthed at the contractor's pier; in any event, it is out of navigation. However, it is our position that, regardless of the extent of repairs, a vessel "out of navigation" is not warranted seaworthy to longshoremen.

[14] Unlike the MARY AUSTIN here, the vessel in *Berryhill* was dry-docked for repairs. Contrary to petitioner's assertion (Br. 20-21), however, it is the extent of repairs that has been deemed significant, not whether the repairs happen to be accomplished in drydock, or at the repair contractor's pier. *See, e.g., Reed* v. *National Bulk Carriers, Inc.*, 118 F. Supp. 608, 609 (S.D. N.Y.), 251 F. 2d 717 (C.A. 2), certiorari denied, 356 U.S. 958, *rehearing denied*, 22; *Lamb* v. *United States*, 163 F. Supp. 206 (E.D. N.Y.), 265 F. 2d 219 (C.A. 2), certiorari denied, 23; *Ryan* v. *United States*, 167 F. Supp. 929 (S.D. N.Y.), *contra*, p. 23.

repairing the propulsion machinery, a grinding wheel furnished claimant by his employer (the repair contractor) disintegrated causing his injury. In rejecting the argument that the *Sieracki* rule was applicable, the Court of Appeals observed that "[n]ot all repairs are 'ship's work', to be performed, historically or currently, by the crew"; it emphasized that "the repairs had nothing to do with loading or unloading the ship" and were "nothing of an improvised, hurried nature, done to save the 'ship work' time, but were of sufficient importance to cause the ship to be drydocked" (238 F. 2d at 387).

Subsequently in *Raidy* v. *United States*, 252 F. 2d 117, affirming, *per curiam*, *Raidy* v. *United States*, 153 F. Supp. 777 (D. Md.), certiorari denied, 356 U.S. 973, the Fourth Circuit refused to extend the *Sieracki* rule in the context of major repairs to and conversion of a government vessel. The facts in *Raidy* are analogous to those here. The government vessel was brought in for major repairs, the manner and scheduling of which were completely under the control of the repair contractor, with the Government retaining the mere right to inspect completed items to insure compliance with specifications (153 F. Supp. at 778). The workman was hurt while making a chalkline measurement to align a piece of machinery, when he fell through a hole in a metal walkway caused by the removal of a plate in that walkway by other employees of the contractor (153 F. Supp. at 778). The District Court, whose opinion was adopted by the Fourth Circuit upon affirmance (252 F. 2d at 118), stressed that the major repairs on the vessel "were not the type of services historically and traditionally rendered to the ship by members of the crew but to the contrary required the facilities and skilled personnel of

a modern well equipped shipyard" (153 F. Supp. at 779). See, also, *Union Carbide Corp.* v. *Goatt*, *supra*, 256 F. 2d at 455.[16]

The third recent decision of a Court of Appeals relied on below was that of the Second Circuit in *Berga* v. *National Bulk Carriers Corp.*, 251 F. 2d 717, certiorari denied, 356 U.S. 958. Plaintiff in *Berga* was a rigger injured while pulling a hoist to raise a new bulkhead into position. Pointing to the major repairs undertaken on the vessel by plaintiff's employer (the repair contractor) while the vessel was docked, as here, at the contractor's pier,[17] the Second Circuit (per Judge Hand) declined to permit recovery on the ground of breach of warranty of seaworthiness. The court observed with regard to the *Sieracki* standard that "there must be some limit, else the whole fabrication of a new ship would be included" (251 F. 2d at 718).[18]

In subsequent decisions, the exclusion of the major repair situation from the ambit of the *Sieracki* ruling

[16] Petitioner's assertion of a conflict between the decision below and the views of the Fourth Circuit, supposedly reflected by petitioner's only decision in *United States* v. *Lindgren*, 28 F. 2d 725, affirmed, 281 U.S. 38 (Pet. pp. 11-15), is thus rebutted by those recent decisions in *Gioiello* and *Goatt*, squarely in accord with the decision of the Third Circuit here. Moreover, in *Lindgren*, a pre-*Sieracki* decision, there was no discussion of the exact nature and extent of the repairs undertaken.

[17] See the decision in the District Court, 148 F. Supp. 608, 609 (S.D. N.Y.).

[18] See Judge Hand's earlier opinion in *Guerrero* v. *United States*, 167 F. 2d 352 (C.A. 2), certiorari denied, 335 U.S. 843, where he said:

> "* * * probably all that major structural repairs were, at least normally, to be done elsewhere than in the home port, often not even by the crew; * * *." [167 F. 2d at 354]

The District Court noted with regard to the extent of repairs in the instant case that it constituted "about as close an approximation to home port structural repairs as analogy will allow" (R. 17).

has been reiterated. In *Lyon* v. *United States*, 163 F. Supp. 206 (E.D. N.Y.), affirmed, 265 F. 2d 219 (C.A. 2), plaintiff was a ship fitter employed by a repair contractor in the performance of major repairs on a government vessel docked at a pier in Brooklyn. He was injured in a fall while using a crowbar as a fulcrum to set the base of a lifeboat winch. The District Court ruled, in a decision upheld by the Second Circuit, that in the context of the major repairs undertaken on the vessel no implied warranty of seaworthiness existed (163 F. Supp. at 207). And in *Amato* v. *United States*, 167 F. Supp. 929 (S.D. N.Y.), the District Court held, in a repair situation analogous to that here, that the *Sieracki* standard did not apply to any part of the general performance of major repairs on a vessel (167 F. Supp. at 935-936).

Petitioner, unable to distinguish these recent decisions relied on by the court below, looks for support either to cases of pre-*Sieracki* vintage [19] or to instances where the repairs were not commensurate with those here. Thus, *Ronosich* v. *Union Dry Dock & Repair Co.*, 67 F. 2d 377 (C.A. 3), a pre-*Sieracki* decision which found no unseaworthiness, gave no indication that major repairs were involved at the time of claimant's injury. The same is true of *Read* v. *United States*, 201 F. 2d 758, another Third Circuit decision, expressly distinguished by the court below in this case "on the amount of work involved" (R. 138-139). And *Crawford* v. *Pope & Talbot, Inc.*, 206 F. 2d 784, also a Third Circuit decision, did not involve major repairs at all but merely tank-cleaning undertaken by shore-based workers and seamen of the vessel working

[19] See fn. 16, *supra*, p. 22.

together while the vessel was preparing to finish loading her cargo.

Moreover, it is not significant under *Sieracki* to determine whether petitioner's work as a marine engineer at the time of the accident, viewed without the perspective of major repairs, was or was not the work traditionally done by seamen. The question here is whether the operation as a whole constituted major repairs to the vessel; if this question is answered affirmatively, then the warranty of seaworthiness is not made to those aboard, regardless of the type of task each of those many repairmen may perform. This is so since major repairs to a vessel equivalent to "home port structural repairs" was not a task ever undertaken by the crew." *E.g., Guerrini* v. *United States*, 167 F. 2d 352 (C.A. 2), *supra*, fn. 18.

In each of the recent Court of Appeals decisions denying recovery for breach of warranty of seaworthiness in cases involving repairs of an extensive nature, the *Sieracki* standard has been properly focused on the totality of the repair job, rather than on the type of work the individual happened to be performing at the moment of his injury. It is clear that, had the inquiry been directed at the latter consideration, the Ninth Circuit in *Berryhill*, *supra*, could just as easily have found that shorebased worker, repairing machinery, to have been doing the work traditionally done by seamen; the same conclusion by the Fourth Circuit was possible in *Baidy*, *supra*, where the workman was merely making a chalkline measurement at the moment of injury; by the Second Circuit in *Bora*, *supra*, where the workman was pulling a hoist to raise a bulkhead into position; and by the district courts in *Lyon* and *Amato*, *supra*, where the workmen were using a crowbar as a

fulcrum on a lifeboat winch, and in the other case simply painting.

In addition, as recognized by the courts, individual job analysis of teams of shorebased workers performing major repairs on a vessel would lead to completely fortuitous results in recoveries for breach of warranty of seaworthiness. If two or more men, working in close proximity aboard a vessel, were injured in the same accident, protection under a warranty of seaworthiness would depend on the complete fortuity of the individual worker's trade or craft, or, even more fortuitously, on the task he was involved in at the exact moment of the accident.[20] See especially, *Amato* v. *United States*, 167 F. Supp. 929, 935-936 (S.D.N.Y.). Such resulting inequality among workers in the same work force engaged in the major repairs aboard a vessel would clearly be carrying the *Sieracki* standard to an extreme.[21] *Amato* v. *United States*, *supra*.

Finally, it is evident (and petitioner does not seriously attempt to demonstrate otherwise) that the work performed on the MARY AUSTIN constituted major repairs.[22] For years subsequent to its retirement after

[20] Under *Sieracki* and subsequent decisions of this Court, it is not the workman's task, but the repair operation involved, "not the 'label of trade or skill'" but the job performed at the time of injury, that is critical to the determination of recovery on the ground of breach of warranty of seaworthiness. *United Pilots Assn.* v. *Halecki*, 358 U.S. 613, 617.

[21] Cf. *Pope & Talbot* v. *Hewn*, 346 U.S. 406, where in an incidental repair situation involving only one workman, emphasis was placed on "equal treatment to those exposed to the same dangers, and the warranty was held applicable. 346 U.S. at 413.

[22] As we have indicated, the District Court found that the reactivation of the MARY AUSTIN constituted "about as close an approximation to home port structural repairs as analogy will allow" (R. 17a, see n. 18, *supra*. On appeal to the Third Circuit, petitioner did not contest this finding, and that court concluded that the extent of repairs in this case was similar to that involved in

World War II, the vessel had been deactivated and laid up as a "dead hulk" in the "moth ball fleet" at Norfolk, Virginia (R. 9). When reactivation for active service was ordered in 1951 in connection with the Korean hostilities (R. 136), it became necessary to survey the entire ship and prepare detailed specifications of reconditioning, repair, and replacement (R. 9). These specifications covered not only a complete reactivation of the entire water system (R. 9) but of the entire ship (R. 9, 17, 78), and the reactivation process required the presence of the vessel at the repair contractor's pier for some five weeks. During this time, the repair contractor and its teams of repairmen were involved, in compliance with the hundreds of specifications in the contract, in repairing and making fit *all* the machinery and *all* other parts of the vessel not simply, as petitioner emphasizes (Br., pp. 18, 20, 21), the water lines of the vessel (R. 9, 17, 78).

In these circumstances, the finding of the District Court and the Court of Appeals that the major repairs in this case were similar to those involved in *Berryhill*, *supra*, *Baldy*, *supra*, and *Berge*, *supra*, and constituted "as close an approximation to home port structural repairs as analogy will allow" (R. 17) cannot be disputed. And it is equally clear that unless the *Sieracki* doctrine was intended to apply to shorebased workers in any repair situation whatever, as petitioner here necessarily contends (Br., p. 18), then that doctrine is inapplicable to the reactivation of the MARY AUSTIN and petitioner's work in that reactivation.

Berryhill, *Baldy* and *Berge*, *supra*. Apparently appreciating the force of this finding here, petitioner, unable to show that the repairs on the MARY AUSTIN were minor in nature, improperly focuses on the repairs to the vessel's water lines, a small part of the total reactivation job.

C. *Even If the Warranty of Seaworthiness Doctrine Applies to a Vessel Out of Navigation and On Which Major Repairs Are Being Performed, the Vessel Here Was Reasonably Fit for the Purpose Intended and Thus Was "Seaworthy"*

Even if this Court were to hold that the seaworthiness warranty extends to the MARY AUSTIN despite the facts (1) that it was a vessel out of navigation at the time of the accident and (2) that it was undergoing major repairs, the decision below denying recovery for breach of warranty of seaworthiness is still correct since there was no breach of warranty in this case.[23] As well recognized in numerous decisions by this Court and the lower federal courts, the warranty of seaworthiness, although it imposes an absolute duty on the shipowner, is not a warranty that the ship or gear or equipment is absolutely safe in all events, but only reasonably so, depending on the particular facts and circumstances. *Boudoin* v. *Lykes Bros. S.S. Co.*, 348 U.S. 336, 339; *Pope & Talbot, Inc.* v. *Cordray*, 258 F. 2d 214, 218 (C.A. 9); *Brown* v. *Bravo Corp.*, 258 F. 2d 704, 706 (C.A. 3); *Ross* v. *Steamship Zeeland*, 240 F. 2d 820, 822 (C.A. 4); *Berti* v. *Compagnie*

[23] The District Court not only ruled that the warranty did not apply in the situation of a vessel out of navigation and undergoing major repairs but also held that, in any event, "The condition of the S. S. MARY AUSTIN when delivered by the United States of America to Atlantic for reactivation purposes only did not constitute the S. S. MARY AUSTIN an unseaworthy vessel" (R. 20). The Court of Appeals, holding that no warranty applied, did not reach the question of whether the vessel was, or was not, unseaworthy (R. 135-139). Similarly, if this Court agrees with the Court of Appeals that the warranty does not apply to a vessel out of navigation and undergoing major repairs, it would not be necessary to consider the issue posed under this Point I, C, namely, whether the vessel and its gear were, in fact, reasonably "seaworthy" for their intended use.

De Navigation Cyprien Fabre, 213 F. 2d 397, 400 (C.A. 2); *Nunes* v. *Farrell Lines*, 227 F. 2d 619, 622 (C.A. 1).[20] And the warranty not only limits the ship owners' obligation to provide gear or equipment to that which is simply reasonably safe, but also equipment which is reasonably adequate and safe for the use which the owner can expect will be made of the equipment. *Pope & Talbot, Inc.* v. *Cordray*, 258 F. 2d 214, 218 (C.A. 9); *Nunes* v. *Farrell Lines*, 227 F. 2d 619, 622 (C.A. 1).

The "equipment" involved here was the loose plug in the water system which fell and struck petitioner when others of the contractor's employees unexpectedly turned on the water in the "opened up" water system (R. 18-19). The United States, however, had left no doubt that it did not warrant the adequacy of the entire water system. In detailed specifications, the Government had informed the contractor of the exact nature of this system, that it had been "opened up" and required testing, repairing, and reconnection, and, most specifically, that the contractor should repair or replace any defective or missing plugs in the water lines (R. 9, 79-80). The fact that the water system was in this "opened up", unconnected, and inadequate condition was one of the very reasons the vessel was brought in for reactivation and repairs, and consequently, as the District Court concluded, it should not have been surprising to the contractor's employees that

[20] See also, *Reynolds* v. *Royal Mail Lines*, 254 F. 2d 55, 56 (C.A. 9); *Mesia* v. *Kea Steamship Corp.*, 260 F. 2d 747, 750-751 (C.A. 3); *Poppert* v. *United States*, 225 F. 2d 595, 598 (C.A. 2); *Manhat* v. *United States*, 220 F. 2d 143 (C.A. 2), certiorari denied, 349 U.S. 966; *Lyon* v. *United States*, 163 F. Supp. 206, 208 (E.D. N.Y.), affirmed, 265 F. 2d 219 (C.A. 2); *Preston* v. *Mississippi Shipping Co.*, 156 F. Supp. 652, 656 (E.D. La.)

a loose plug might fall out upon the application of water pressure (R. 18-19).

To conclude that the shipowner had warranted this water system or its component parts, including the line plugs, to be seaworthy, or adequate and safe for any purpose, and that it had breached this warranty, would be to ignore the contract specifications and the very reason for the employ of such men as petitioner aboard the MARY AUSTIN. While a water system's intended and reasonably anticipated purpose is normally the distribution of water through its parts, that purpose was hardly normal or contemplated under the specifications prepared by the Government. The only intended and anticipated purpose of the system in these circumstances was its complete repair, and by the express terms of its contract of repair the Government had every reason to expect that the contractor's employees would use the system with that purpose in mind. The manner and method of accomplishing the required testing and repair were left completely to the contractor, and the Government had no right to interfere with the way the work was done.

Given these facts, we submit that either of two conclusions is possible with regard to a warranty of seaworthiness here. On the one hand, it might be held that the shipowner's warranty was only that the water system was reasonably fit for repair, not for water distribution, and that there was no breach of this limited warranty. Alternatively, to view it as some courts have, while there may be a warranty applicable generally to vessels brought in for repair, it would be anomalous to include parts designated for repair in that warranty; thus, the water system of

the MARY AUSTIN, specifically designated for repair, cannot be considered in terms of an implied representation of its "seaworthiness".

None of the decisions of this Court, applying the warranty of seaworthiness under the *Sieracki* doctrine, furnishes the slightest basis for concluding otherwise. In *Sieracki*, *Petterson*, *Rogers*, and *Cramaty*, *supra*, the workman was injured because of a defect in the equipment intended, and impliedly warranted safe, for use in loading the vessel for the voyage then in progress; while in *Pope & Talbot* and *Skovgaard*, *supra*, the injuries were sustained because of unsafe conditions on decks which the repairmen had to use to accomplish minor repairs on loading equipment.[25] In each, the vessel or gear was indisputably unsafe for the intended purposes of the particular jobs involved; in none was there a contract, as here, specifying that the equipment was unsafe for normal use, and that it must be repaired by the workmen before it was "tight and ready for service" (R. 9, 80-81).

The lower federal courts have refused to extend and distort the concept of the warranty of seaworthiness by applying it to the very conditions which, as in this case, cause the shipowner to bring his vessel in for repair, and which the shipowner specifically designates for repair. Thus, in an early decision, the Second Circuit held the shipowner free of liability where a repairman fell through a hatch cover on a vessel which was brought in for repair, *inter alia*, of 50% of its hatch covers. *Byars* v. *Moore*-

[25] In *Pope & Talbot*, the workman fell through an "uncovered hatchway hole" aboard the vessel, 346 U.S. at 407. In *Skovgaard*, he slipped on a deck area from which oil had not been removed and fell to his death. 358 U.S. at 589.

McCormack Lines, 155 F. 2d 587. The court absolved the vessel on two principal considerations: (1) "because the independent contractor had been warned of the defective condition of the hatches and had been given possession of the ship in order to repair them", and (2) because the shipowner could not be held to a duty of warning each individual employee of the defective covers since he could not know which of the contractor's employees would be doing what jobs. 155 F. 2d at 588.

Recent appellate rulings have similarly denied recovery for breach of warranty of seaworthiness in situations analogous to that here. The Second Circuit has readopted its view in *Byars*. In *McDaniel* v. *The M S Lisholt*, 257 F. 2d 538, certiorari granted, judgment vacated and case remanded for new trial, 359 U.S. 26, a fireman came aboard a vessel as a fire watcher after a small blaze had broken out and been temporarily controlled. He sued for injuries sustained from a subsequent flash explosion aboard. Denying recovery for breach of warranty of seaworthiness, the court stated (257 F. 2d at 540):

> * * * it is undisputed that the vessel was unseaworthy at the time libelant went aboard. He was stationed aboard the ship because of the vessel's unseaworthiness occasioned by the fire. There can be no duty to furnish a seaworthy ship to a fireman who was on the vessel knowing it to be unseaworthy, and was on board because of its unseaworthiness.[28]

[28] See also, *Filipek* v. *Moore-McCormack Lines*, 258 F. 2d 731 (C.A. 2), certiorari denied, 359 U.S. 927. The *McDaniel* judgment was vacated by this Court and the case remanded for a new trial on the issue of negligence under the standard enunciated in *Kermarec* v. *Compagnie Generale*, 358 U.S. 625, *infra*, pp. 35-36.

The Third Circuit has denied recovery for breach of warranty of seaworthiness to repairmen on board a vessel to repair defective conditions, one of which causes the injury. *Brzozowski* v. *Isthmian S. S. Co.*, 163 F. 2d 720, 722; cf. *Mosle* v. *Kea Steamship Corp.*, 260 F. 2d 747, 752. And the Ninth Circuit has denied recovery for breach of warranty of seaworthiness where, as here, a vessel's equipment was adequate for its intended purpose but was not used in accordance with that purpose by the contractor's employees, thus causing the injury. *Reynolds* v. *Royal Mail Lines*, 254 F. 2d 55, 56-57.

In a situation almost identical to that in the present case, the Fourth Circuit has noted the anomaly of speaking of an item specified for repair in terms of a "warranty of seaworthiness". In *Raidy* v. *United States*, 252 F. 2d 117, affirming, *per curiam*, *Raidy* v. *United States*, 153 F. Supp. 777, certiorari denied, 356 U.S. 973, *supra*, pp. 21-22, the court denied recovery for breach of warranty of seaworthiness to a shore-based worker injured when he fell through a hole in a metal walkway caused by the removal of a defective plate in that walkway by other employees of the contractor. In a cogent analysis, equally applicable to the defective plugs here, the court ruled that "[i]t seems * * * a misnomer to speak of the removable and absent footplate as 'unseaworthiness of the ship'. The removal of the absent plate, for the substitution of others, was a part of the work required to be performed by the contract specifications" (252 F. 2d at 118). See also, *Pinion* v. *Mississippi Shipping Co.*, 156 F. Supp. 652, 656 (E.D. La.); *Lyon* v. *United States*, 163 F. Supp. 206, 208 (E.D. N.Y.), affirmed, 265 F. 2d 219 (C.A. 2).

And if it is not a "misnomer" to speak of a warranty of seaworthiness applying to any part of a vessel des-

ignated and brought in for repair, like the defective plug causing petitioner's injury, then the only possible application of the warranty is with regard to the equipment's fitness for its intended purpose. As we have seen, *supra*, pp. 28-29, that purpose in this case was solely one of repair, and for that purpose the water system of the MARY AUSTIN was reasonably safe.

II

The Courts Below Properly Denied Recovery on the Ground of Negligence

A. *The Courts Below Correctly Found that the Government Had Not Failed to Provide Petitioner with a Reasonably Safe Place to Work*

Petitioner attempts to fashion another source of absolute liability by contending that his alternative allegation involving failure to provide a safe place to work is also a branch of "unseaworthiness" not related in any way to negligence standards of due care (Pet., pp. 17-21, Br., pp. 21-24). This contention, however, is gainsaid by many decisions of this Court and the lower courts which clearly establish that the duty of a vessel to provide a safe place to work is measured solely by the negligence standard of ordinary care in the circumstances. Moreover, while, as we show below in Point II, B, the Court of Appeals correctly held that there was no violation of this duty here even if it be considered "nondelegable," as petitioner maintains, in our view this Court's decisions likewise establish that the duty of due care involves the actions of the vessel alone and does not in any way imply responsibility for negligence on the part of the contractor in failing to provide his employees with a safe place to work. And, as found by the District Court—after detailed treatment of the contract of reactivation, the complete con-

trol of the contractor over the method and manner of repair, the accident itself, and the condition of the vessel—there was no violation of *its* duty by the Government of failing to exercise due care in providing petitioner with a reasonably safe place to work.

Only last term, the Court, in several decisions, considered the scope of the vessel's duty to provide a safe place to work, to shorebased personnel aboard for repair or reconditioning purposes. In *United Pilots Assn.* v. *Halecki*, 358 U.S. 613, the vessel was turned over to a contractor for a periodic overhaul. Part of the job entailed cleaning the ship's generators with carbon tetrachloride, and this was undertaken by a subcontractor which employed the deceased workman. The Court disposed of the action stemming from the workman's death from carbon tetrachloride poisoning, and grounded on the usual combined allegations of breach of warranty of seaworthiness and negligence, by remanding for a finding on negligence alone[27]; the Court expressly noted that, as to this issue, "the defendants owed a duty of exercising reasonable care for the safety of the decedent" (*id.* at 618-619). Moreover, as the basis for its remand on this question, the Court stressed the fact that the vessel, aware of the ventilation system in the engine room where the cleaning was done, also had actual knowledge of (indeed, had required under its contract of overhaul) the use of carbon tetrachloride in the cleaning (*id.* at 615, 619). By implication, the holding in *Halecki* was that, if the vessel had no such knowledge and personal responsibility for the method of work, and the question

[27] Recovery on the ground of breach of warranty of seaworthiness was denied.

of negligence solely involved the subcontractor, the vessel would not be liable (in the subcontractor's stead) for failing to provide a safe place to work. This holding completely negates petitioner's two-fold argument: (1) that providing a safe place to work is an absolute duty imposed under standards of seaworthiness rather than negligence, and (2) that, in any event, the failure of the contractor to provide a safe place to work, even though the vessel is in no way actually culpable, is sufficient to impose liability on the vessel on this same ground.

The holding in *Halecki* on the question of providing a safe place to work is reiterated in last term's decisions in *The Tungus* v. *Skovgaard*, 358 U.S. 588, and *Kermarec* v. *Compagnie Generale*, 358 U.S. 625. In the former, an independent contractor's employee went aboard a vessel to repair a pump in use in unloading an oil cargo. He slipped on some oil which had spilled over onto the deck and fell to his death. The conclusion that the case presented a question of fact as to whether the vessel had provided the decedent with a reasonably safe place to work was specifically predicated on the finding that "the officers and crew of the [vessel] remained in over-all control of the vessel, and * * * were well aware of the existence of the oil spill and of the danger created by it for approximately an hour before [decedent] arrived on board" (*Skovgaard*, *supra*, at 594). Once again the Court emphasized the need for personal responsibility and actual culpability on the part of the vessel and thereby refuted the present petitioner's contention that the negligence of the independent contractor, in and of itself, creates liability on the vessel's part for failing to provide a safe place to work. Finally, in *Kermarec*, *supra*, the

Court's position was put in these terms (358 U.S. at 632):

> We hold that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case. * * *

That the United States as shipowner did not fail to provide petitioner with a reasonably safe place to work aboard the MARY AUSTIN seems obvious even from a cursory examination of the findings of the District Court. The sole defect underlying petitioner's claim of working in an unsafe place is the loose waterline plug which dropped and injured him upon the unexpected introduction of water pressure into the pipes by the contractor's employees. Completely contradicting petitioner's argument that the loose plug constituted a latent defect (Br., pp. 24-27), the record clearly reveals, and the District Court found (R. 9), that the ship had specifically pointed to loose and defective water line plugs in the contract of repair. See *supra*, pp. 4, 28-29. Petitioner's argument that the loose plug causing the accident was a "latent" defect necessarily implies the absurd conclusion that the vessel had the duty of personally warning each of the repair contractor's employees of each of the multifold defects specified for repair in the repair contract.

Aside from the unmeritorious "latent defect" claim, there is no suggestion that the Government had anything to do with the accident, or that under its contract with petitioner's employer it could have interfered in any way with the manner of repairs and reconditioning utilized by the contractor's employees. No such claim

could be made, of course, since, as the District Court found, (1) all testing in the reconditioning of the "opened-up water system was to be handled by the contractor (R. 9), and (2) the contractor had complete control over the reactivation work since the shipowner's employees aboard the vessel were merely inspectors authorized to check completed items for conformity with contract specifications, but not authorized to interfere, and not actually interfering in any way with the manner or means of work of the contractor's employees (R. 9-11, 18-19).

In the light of these circumstances, it is difficult to see what the United States could have done, other than what it had done, to avoid this accident. It did not conceal, as petitioner now claims, the defect of loose or missing plugs in the water lines for it was these defects, *inter alia*, that were specifically designated for repair. In fact, as we show below in Point II, B, it is extremely doubtful that this type of defect in the water system of a vessel could afford the basis for any complaint of failure to provide a safe place to work. Furthermore, even if the government inspectors aboard were cognizant of petitioner's fellow-employees turning on the water, which is not established by the record or found by the District Court, they had no right to interfere with the performance of work aboard the MARY AUSTIN.

This Court does not have to search far for persuasive authority in the lower courts consistently holding that, in identical or analogous circumstances, there is no breach by the shipowner of its obligation of due care, and that the actions of the independent contractor do not redound to the liability of the shipowner. A recent Second Circuit decision is squarely in point. In *Lyon*

v. *United States*, 163 F. Supp. 206 (E.D. N.Y.), affirmed, 265 F. 2d 219, *supra*, p. 23, a government vessel was brought in to a repair contractor for major repairs. The contractor's employee was injured, when, in using a crowbar as a fulcrum to set the base of a lifeboat winch, he fell from a part of the vessel where a handrail had been removed in the process of repairs. Rejecting the contention that the vessel had any liability in negligence by dint of the contractor's failure to provide a temporary barrier or railing, the District Court emphasized that the manner of performance of repairs was completely within the contractor's control, under contract provisions identical with those here, merely allowing an inspection team aboard on behalf of the shipowner (163 F. Supp. at 208-210). The Second Circuit agreed, *per curiam*, ruling succinctly that "[I]n the absence of power to supervise or control the work, the shipowner cannot be held negligent" (265 F. 2d at 220).

This ruling accords with the consistent view adopted in earlier holdings in the Second Circuit and in the other courts of appeals. In *Filipek* v. *Moore-McCormack Lines*, 258 F. 2d 731 (C.A. 2), certiorari denied, 359 U.S. 927, the shorebased workman was injured when a king post snapped while he was testing it for stress and strain. On the question of the vessel's liability in negligence for failing to see that the workman had a reasonably safe place to work, the court exonerated the vessel, indicating that while certain of the vessel's officers were aboard they had no control over the work performance (258 F. 2d at 737). See also, *Berti* v. *Compagnie De Navigation Cyprien Fabre*, 213 F. 2d 397, 401 (C.A. 2). And in *Amato* v. *United States*, 167 F. Supp. 929 (S.D. N.Y.), *supra*, p. 23, the court ob-

served, in circumstances essentially similar to those here, that (167 F. Supp. at 934):

> * * * the owner could scarcely be expected to anticipate or prevent every hazard which arose in the course of the work. To impose such a requirement would make him, for all practical purposes, an insurer against the negligence of the contractor, and the owner's duty certainly does not yet go that far.

A clear exposition of the established principle that the vessel's so-called "non-delegable" duty of using due care to provide a safe place to work is not, in fact, non-delegable where complete control of the work has been assumed by the contractor, and the area of work surrendered to him with no unknown hazards, is provided by the Third Circuit's decision in *Brabazon* v. *Bolships Co.*, 292 F. 2d 904, 906-907. See also, *Osnovik* v. *United States*, 204 F. 2d 654, 655 (C.A. 3); *Mesle* v. *Koa Steamship Corporation*, 260 F. 2d 747, 750 (C.A. 3). The Fourth Circuit, in *Raidy* v. *United States*, 252 F. 2d 117, *supra*, adopted the district court's view that any negligence on the part of the contractor's employees in removing the walkway plate through which the injured workman fell did not make the vessel liable for having failed to provide a safe place to work. See also, *Blankenship* v. *Ellerman's Wilson Line New York, Inc.*, 265 F. 2d 455, 457-458 (C.A. 4).[28] And,

[28] *Blankenship* also refutes any suggestion that the negligence of the independent contractor's employees, in and of itself, makes the vessel unseaworthy. See also, *Cramaela* v. *The Joachim Hendrik Fisser*, 358 U.S. 423; *Titus* v. *The Santorino*, 258 F. 2d 352 (C.A. 9); *Procida Co. Navega S.A.* v. *Mandalis*, 262 F. 2d 284 (C.A. 4); *Pluss* v. *N.V. Nederlandsche Amerikaansche S.M.*, 259 F. 2d 143, 145 (C.A. 9); *Eccles* v. *Pacific-Atlantic Steamship Co.*, 218 F. 2d 562 (C.A. 9).

finally, the Ninth Circuit in a recent decision has observed that, whether the question of the owner's duty to provide a safe place to work for the independent contractor's employees be framed in terms of negligence or unseaworthiness, "the shipowner has no burden of an insurer and is not required to provide an accident proof ship": moreover, the owner is not to be held for the negligence of the independent contractor. *Phipps* v. *N. V. Nederlandsche Amerikaansche S., M.*, 259 F. 2d 143, 145 (C.A. 9).

Nor do any of the decisions relied on by petitioner bear out his contention that the vessel's duty to provide a safe place to work—where complete control of that work has been surrendered to the contractor—makes the vessel liable for an injury to a repairman incurred solely as a result of the negligence of the contractor's employees in the repair process. None of them even involves this situation. Thus, petitioner's heavy reliance on *Crumady* v. *The Joachim Hendrik Fisser*, 358 U.S. 423, is misplaced. In *Crumady*, this Court held that a vessel was liable on the ground of breach of a warranty of seaworthiness where the vessel had furnished a defective winch to a stevedoring company impliedly warranting it to be safe, where the vessel did not reveal the nature of the defect, and where the defective winch in conjunction with the additional negligence of the stevedoring company's employees in using it caused the accident. Here, of course, unlike the situation in *Crumady*, the defective plug was not warranted to be safe but was designated for repair as part of the reactivation of the MARY AUSTIN'S water system. Thus, as the court below concluded, the sole act of culpability involved was that of the contractor's em-

ployees in turning on the water without testing and "proving out" the water lines.

As to *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96, this Court was there concerned solely with a vessel's unseaworthiness in its failure to supply its crew with sound rigging, a failure unaffected by the subsequent negligence of a ship's officer in using the rigging. *Dixon* v. *United States*, 219 F. 2d 10 (C.A. 2), merely involved the seaworthiness of a vessel's ladder after repair and during a voyage. Similarly, the decisions in *Poignant* v. *United States*, 225 F. 2d 595 (C.A. 2) (seaworthiness of vessel without garbage chutes, where apple peel on floor was the cause of injury); *Pacific Far East Lines* v. *Williams* 234 F. 2d 378 (C.A. 9) (seaworthiness and due care of vessel failing to provide longshoremen with adequate lighting); and *The Steandbee*, 102 F. 2d 577 (C.A. 6) (seaworthiness of vessel's safety appurtenances around dangerous oil pump) have no bearing whatever on the factual setting of the accident here, and in no way militate against the result reached below.

B. ***The Safe Place to Work Doctrine Is Not Applicable***

As we have just shown in Point II, A, *supra*, whether or not petitioner had a safe place to work at the moment he sustained his injury aboard the MARY AUSTIN does not concern the United States as shipowner since it turned over the vessel to the contractor with complete notice of the defective water system and water line plugs which were to be repaired, and with no control over the work performance of the contractor's employees in testing and repairing the water system. The facts supporting notice of the defect and lack of control in the work were basically undisputed and, in any

event, were properly upheld by the Third Circuit on appeal as not being clearly erroneous. *McAllister* v. *United States*, 348 U.S. 19. In our view then, regardless of the applicability of the "safe place to work" doctrine to the facts of this case, the Government, under firmly established principles, is absolved from liability on this ground by having exercised due care to the extent of its responsibility.

As an additional basis for denying petitioner recovery in negligence, we suggest that it is extremely doubtful, as the Court of Appeals observed (R. 137), that he may take advantage of the "safe place to work" doctrine in the circumstances of this case. There were no hidden hazards affecting petitioner's work, no lack of basic safety equipment, no lack of proper supervision on the contractor's part, at least as established by the record; in other words, there was nothing other than the dangers involved in the testing and repairs of major proportion that were undertaken on the MARY AUSTIN. If this is enough to create an unsafe place to work, then every such vessel undergoing major repair is inherently and necessarily an unsafe place to work, and every injured employee is entitled to recover without consideration of whether the vessel or his employee failed to exercise due care.

The courts, however, have not understood this to be the rule. Rather, it appears well established that "the rule creating the duty to furnish a safe place to work does not apply where the prosecution of the work itself makes the place and creates the danger". *Filipek* v. *Moore-McCormack Lines*, 258 F. 2d 734 (C.A. 2), certiorari denied, 359 U.S. 927; *Byars* v. *Moore-McCormack Lines*, 455 F. 2d 587, 588 (C.A. 2). The facts here are clearly distinguishable from those involving hidden

hazards (cf. *Mesle* v. *Kea Steamship Corp.*, 260 F. 2d 747 (C.A. 3)); inadequate lighting (e.g., *Read* v. *United States*, 201 F. 2d 758 (C.A. 3); *Ross* v. *Steamship Zealand*, 240 F. 2d 820 (C.A. 1)); or lack of other basic safety equipment (e.g., *Lester* v. *United States*, 234 F. 2d 625 (C.A. 2); certiorari granted, 352 U.S. 880[29]) and do not afford a basis for recovery for failure to provide a reasonably safe place to work.[30]

CONCLUSION

For the foregoing reasons, it is submitted that the judgment below should be affirmed.

Respectfully submitted.

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SEPTEMBER, 1959.

[29] Dismissed on settlement between the parties.

[30] See also the cases on which petitioner relies, discussed *supra*, pp. 40-41.

IN THE

Supreme Court of the United States

October Term, 1958.

No. [redacted] 11

EDGAR ALLEN WEST,

Petitioner,

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF COMMERCE, MARITIME ADMINISTRATION, et al.

Respondent,

and

ATLANTIC PORT CONTRACTORS, INC.,

Respondent Impleaded.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT IMPLEADED

[redacted]

Counsel for Respondent Impleaded

[redacted]

Of Counsel.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1958.

No. 541.

EDGAR ALLEN WEST,

Petitioner,

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF COMMERCE, MARITIME ADMINISTRATION, ET AL.

Respondent,

v.

ATLANTIC PORT CONTRACTORS, INC.,

Respondent-Impleaded.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT-IMPLEADED.

OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania is reported at 143 F. Supp. 473 (E. D. Pa., 1956) (R. 8). The opinions of the Court of Appeals for the Third Circuit are reported at 246 F. 2d 443 (R. 129) and 256 F. 2d 671 (R. 135).

COUNTERSTATEMENT OF QUESTIONS PRESENTED.

1. Does the warranty of seaworthiness extend to a shoreside worker engaged in reconditioning a ship which is not in navigation?

2. Did libellant prove negligence on the part of the respondent?

COUNTERSTATEMENT OF THE CASE.

Petitioner, a shoreside marine engineer employed by Respondent-impleaded, Atlantic Port Contractors, Inc., instituted this suit in the District Court for the Eastern District of Pennsylvania by a libel in personam against the respondent, United States, as owner of the Liberty Ship, S. S. MARY AUSTIN.

The libel claimed damages for injuries suffered aboard the "MARY AUSTIN" on grounds that the vessel was unseaworthy and that respondent had failed to provide libellant with a safe place to work.

The trial court ruled that the evidence failed to establish either unseaworthiness or negligence on the part of respondent and dismissed the libel and the action over for indemnity.

Petitioner persists in referring to the personnel aboard the ship as a "crew", whereas, in fact, the trial court specifically found that they were not a crew in the ordinarily accepted context; they merely performed routine inspection of the reactivation work. (See Finding of Fact No. 7, R. 10, 11.)

The "MARY AUSTIN" had been placed in the so-called "Moth Ball Fleet" following World War II. In connection with the Korean conflict, it was decided to reactivate her and place her in active service.

Respondent-impleaded, Atlantic Port Contractors, Inc., was awarded the contract for the complete reactivation and

overhaul of the ship. On November 5, 1951, the "MARY AUSTIN", a dead, completely deactivated vessel, was delivered at Pier 5, on the Delaware River, Philadelphia, Pennsylvania to Atlantic Port Contractors, Inc. for reactivation.

During the course of this work, on November 21, 1951, petitioner was working on the rings inside the low pressure cylinder of the ship's main engine when he was struck on the left knee by a pipe plug which came from an overhead water pipe when a fellow employee turned on the water without warning. Suit was brought for the injury thus received.

The trial court found that the "MARY AUSTIN" was not a vessel in navigation at the time of the injury; and that the work being done by West was not of the type ordinarily performed by seamen, therefore, libellant was not within the class of persons to whom the warranty of complete seaworthiness runs. The trial court further held that, as to negligence, the duty to provide a safe place to work although non-delegable was not absolute but rather a requirement of reasonable care under the circumstances. The injury to the petitioner resulted from an act of a fellow employee for whom respondent was not responsible and therefore respondent was not guilty of negligence.

The Court of Appeals affirmed both of the above rulings of the District Court.

ARGUMENT.

Scope of Review.

In reviewing a judgment of a trial Court, sitting without a jury in admiralty, an appellate Court exercises no greater scope of review than it exercises under Rule 52(a) of the Federal Rules of Civil Procedure. A reviewing court may not set aside the judgment below unless it is clearly erroneous. *McAllister v. United States*, 348 U. S. 19, 20; *Cromady v. The J. H. Fisser*, 358 U. S. 423, 428; *Lyon v. United States et al.*, 265 F. 2d 219, 220 (2 Cir., 1959); *Clinton v. Joshua Hendy Corp. et al.*, 264 F. 2d 329, 333 (9 Cir., 1959).

I.

The Warranty of Seaworthiness Does Not Extend to a Shoreside Worker Engaged in Reconditioning a Ship Which Is Not in Navigation.

The question of what constitutes a "vessel" should not be confused with the entirely separate and distinct concept of a "vessel in navigation".

The existence of a vessel as an entity begins when she is launched and continues so long as her identity is preserved. *Tucker v. Alexandroff*, 183 U. S. 424, 438 (1902). However, even when launched, a "vessel" does not become a "vessel in navigation" until she in fact is engaged in navigation and marine commerce. *Frankel v. Bethlehem-Fairfield Shipyard, Inc.*, 132 F. 2d 634 (4th Cir., 1942), certiorari denied, 319 U. S. 746 (1943). When a vessel is withdrawn from navigation and commerce, although she retains her identity as a "vessel" for jurisdictional purposes, she has lost her character or status as a "vessel in navigation". *Desper v. Starved Rock Ferry Co.*, 342 U. S. 187 (1952); *Antus v. Interocean S. S. Co.*, 108 F. 2d 185 (6th Cir., 1939).

The concept of a "vessel in navigation" is not determined by whether or not she is afloat but rather from a consideration of all factors and circumstances surrounding the period in question: The trial judge found, 143 F. Supp. 473, 479:

> "The fact that the S. S. MARY MARTIN was afloat is not controlling; although, it should be noted that she most certainly was in her then condition not a navigable vessel. . . ."

The trial court then quoted from the *Despar* case, *supra*, to the effect that there was no vessel engaged in navigation.

It is plain that at the time of the injury to petitioner the "MARY AUSTIN" was not physically able to operate in the functional manner for which she was designed. She had no crew. There was no showing that she possessed a Coast Guard certificate authorizing her to be in service or that she conformed to American Bureau of Shipping Standards.

The trial judge concluded that the "MARY AUSTIN" was not a vessel in navigation and it is submitted that he was eminently justified in so concluding.

The cases cited in petitioner's brief at pages 5 and 6 are all concerned with the status of the craft involved, e.g., whether a houseboat (*Kilb v. Menke*); a barge with a pile driver mounted on it (*The V1481*3); a submerged and wrecked steamship which had been raised and towed to a pier for repairs (*North Pacific S. S. Co. v. Hall*) or a sealing vessel (*Hercules Co. v. The Brigadier General Absolom Baird*) as "vessels" so as to be within the jurisdiction of admiralty courts for the purpose of being subject to maritime liens. This constitutes a wholly separate and distinct question than the status of a "vessel in navigation", so as to bring into play the substantive law relating to the warranty of seaworthiness.

At pages 7, 8 and 9 of Petitioner's Brief references are made to "the officers of the vessel", "a crew of officers" and "captain and crew". The trial court specifically found:

> ". . . these men were the officers, as designated, who sailed with the vessel on her first voyage after her reactivation. At the time of the accident, however, and at all times during the repairs, they had not signed Articles; they were merely on the United States Lines Co. weekly payroll. These six men performed some of the duties of a regular crew, but they did not have control of the repair work, the manner in which it was performed, or the rate at which it progressed, and they did not have control of the ship in the ordinarily accepted context. Their chief function was to assist Mr. Cameron in inspecting the various items of work as completed and to help him discharge his duties efficiently. . . ." (Finding of Fact No. 7, R. 10, 11.)

Petitioner has never in any of the prior proceedings assigned this as error or attacked this finding of the trial court as clearly erroneous; he simply ignores the finding and asserts its converse.

The inapplicability of the warranty of seaworthiness to a shoreside worker engaged in reconditioning a ship which has been removed from navigation so that it may re-enter navigation is considered in *Desper v. Starved Rock Ferry Co.*, 342 U. S. 187 (1952). In that case the petitioner had been employed in the previous year by the owner of a fleet of sightseeing motor boats as a boat operator. Prior to the opening of the season in 1948 he was employed in reconditioning the boats which had been laid up, taken out of navigation, for the winter months. He was at work cleaning, painting and waterproofing the boats, and expected to be employed as a boat operator when the boats

were recommissioned. This court held that he was not a seaman because there was no vessel engaged in navigation.

Petitioner seeks to distinguish the present case from *Desper* on the grounds that the boats in *Desper* were not afloat and that the issue there was whether the decedent was a "seaman" within the purview of the Jones Act. The facts which bring one within the definition of a "seaman" under the Jones Act are the same as those necessary to make the warranty of seaworthiness run to petitioner. There must be a vessel in navigation and the work being performed must be of the type which, historically, was usually performed by members of a ship's crew. Cf. *Seas Shipping Co. v. Sieracki*, 328 U. S. 85 (1946).

The suggestion that the *Desper* decision was reached solely on the basis that the boats there involved were not afloat is without foundation. The important ultimate facts found there as in this case were (1) that the boats had been removed from navigation and (2) the boats had not at the time of the accident been recommissioned and recommitted to navigation.

This Court clearly indicated in the *Desper* case that these were the criteria applicable and not whether the boat was on shore or afloat by citing with approval *Hauch v. American S. S. Co.*, 107 F. 2d 999 (2nd Cir. 1939), and *Atlas v. Interocean S. S. Co.*, 108 F. 2d 185 (6th Cir. 1939).

The *Hauch* case, *supra*, was a suit for maintenance and cure for injuries suffered aboard a ship in the harbor at Buffalo, N. Y. The vessel, after being anchored and empty in the harbor for a year, had been moved to a wharf to be used for grain storage. The plaintiff had been hired to handle lines necessary to move the ship back and forth along the wharf so that grain chutes could reach the hatches. He was injured performing these duties. The Court held that the ship had been withdrawn from navigation and that therefore the services being performed were not of a nature ordinarily performed by seamen.

Antus v. Interocean S. S. Co., supra, affirmed dismissal of an action under the Jones Act. *Antus* was a member of the crew of the "JAMES E. DAVIDSON" during the summer months of 1936 and until December of that year. In December all members of the crew were dismissed. *Antus* and certain other former members of the engineering department were re-hired to lay up the vessel for the winter. Antus was hired to overhaul the engines, remove bolts from cylinder-heads and chests, clean bilges and perform other similar operations. The Court said at p. 187:

> ". . . The vessel, while not consigned to a ship's graveyard, was tied up to the piles. Instead of doing this work in preparation for navigation, the men were preparing the vessel for winter quarters. Appellant was not subjected to any maritime hazards. The fact that he had been, or expected in the future to be, a seaman does not render maritime work which was not maritime in its nature. The finding of the District Court upon this point was correct, and appellant was not at the time of his injury a seaman. Therefore he was not entitled to sue under section 688 of Title 46, U. S. C., 46 U. S. C. A. Sec. 688."

In holding, in the *Hawn* case, that handling lines to warp the ship along a dock were not services ordinarily performed by seamen and, in the *Antus* case, that cleaning bilges was work not maritime in nature, the Courts did not mean that these services are services outside of a seaman's usual employment. It is submitted what they did mean was that upon consideration of all the surrounding circumstances, i.e., (1) the nature of the overall work being done on the ship, (2) the status of the persons performing the work and (3) the status of the ship at the time the work was being done; that the job being performed was not maritime in nature, and was not of the type historically or usually performed by seamen.

Upon consideration of these factors, the work being performed in the "MARY AUSTIN" was not work ordinarily or historically performed by seamen. (1) The overall job being performed on the "MARY AUSTIN" was the rebuilding and reactivation of a dead ship which had been withdrawn from navigation. (2) The "MARY AUSTIN" was a dead ship not in navigation. (3) The plaintiff and other men performing the work were shoreside employees of a ship repair company. The work of reactivating ships which have been stripped and withdrawn from navigation is work which historically has always been and is now ordinarily carried out by shipyards and shoreside workers, not by seamen. (See Conclusion of Law No. 3 of trial court, R. 20.)

Petitioner's Brief, pages 11-14, inclusive, contains an historical review of cases which preceded *Seas Shipping Co. v. Sieracki*, *supra*, and *Pope and Talbot v. Hawn*, 346 U. S. 406. All of these cases involved stevedores or longshoremen engaged in loading or unloading work, traditionally held to be seamen's services. Yet, even this premise has been questioned. See, Tetreault, Seamen, Seaworthiness and the Rights of Harbor Workers, 39 Cornell L. Q. 381, 413, 414 (1954).

At page 16 of his brief, petitioner states that since he was engaged in an effort designed to prepare the vessel for sea he is entitled to the warranty of seaworthiness. No cases are cited in support of this statement.

As was said by the trial judge in the instant case:

> "This case presents about as close an approximation to home port structural repairs as analogy will allow. The work here being done was not of the type ordinarily performed by seamen and does not fall within the doctrine of the Sieracki and Hawn cases." (*West v. United States*, 143 F. Supp. 473, 479.)

The most recent decision in point is *United Pilots Ass'n. v. Halecki*, 358 U. S. 613. There the decedent was

the employee of a sub-contractor of a ship repair yard and died as the result of inhaling carbon tetrachloride fumes in cleaning the electrical generators of a pilot boat as part of its annual overhaul.

This court stated (p. 617):

> "Sea Shipping Co. v. Sieracki and Pope & Talbot v. Hawn made clear that the shipowner could not escape liability for unseaworthiness by delegating to others work traditionally done by members of the crew. Whether their calling be labeled 'stevedore', 'carpenter', or something else, those who did the 'type of work' traditionally done by seamen, and were thus related to the ship in the same way as seamen 'who had been or who were about to go on a voyage', were entitled to a seaworthy ship. See 346 U. S., at 413.
>
> "Neither these decisions nor the policy that underlies them can justify extension of liability for unseaworthiness to the decedent in the present case. The work that he did was in no way 'the type of work' traditionally done by the ship's crew. It was work that could not even be performed upon a ship ready for sea, but only when the ship was "dead" with its generators dismantled.' "

Other recent cases of a similar nature reach the same conclusion.

In *Reida v. United States*, 252 F. 2d 117 (4 Cir., 1958) affirming 153 F. Supp. 777, certiorari denied, 356 U. S. 973, the Fourth Circuit adopted as its own the opinion of District Judge Chesnut, who had cited with approval and followed the decision of the trial judge in the case at bar.

The facts there were that libellant was a shipyard fitter for the respondent impleaded, Bethlehem Steel Company. The United States had awarded Bethlehem the contract for major structural repairs to a seagoing dredge. During the course of the work, while libellant was estab-

lishing a center chalk line for the installation of new hoppers on the dredge, he backed into a hole left by the removal of a metal plate by his fellow workers, fell 25-30 feet and was seriously injured. The principal question was whether the shipowner's duty to provide a seaworthy ship extends to a shipyard worker engaged in making major repairs aboard a vessel in drydock. Judge Chesnut held that the conversion and repairs, particularly libelant's work, were not the type of services historically and traditionally rendered to the ship by the members of the crew; that on the contrary such services require the facilities and skilled personnel of a modern well-equipped shipyard, and that neither reason nor authority required extension of the *Sieracki* doctrine to a case such as this.

The *Haleski* case, *supra*, was decided by the Second Circuit on the same day as *Ivan Berge v. National Bulk Carriers, Inc.*, 251 F. 2d 717 (2nd Cir., 1958) affirming 148 F. Supp. 608, certiorari denied, 356 U. S. 958. In *Berge*, the libellant, a shoreside repair worker, was injured aboard a vessel undergoing major interior repairs and alterations, alongside a pier (148 F. Supp. 608), as was the "Mary Antoinette". The trial court (Judge Murphy) in denying a recovery on the ground of unseaworthiness followed the decision of the lower court in the case at bar.

In *Owens v. United States*, 1958 A. M. C. 216 (S. D. Fla. 1957) the vessel involved was a deactivated one, part of the so-called "Moth Ball Fleet". It was being reactivated for the Korean conflict under a contract similar to the one in the instant case. However, Owens was not an employee of the ship repair contractor but rather had been engaged to serve as assistant second engineer upon reactivation of the vessel. At the time of his injury he was performing inspection work in connection with the reactivation repairs. The Court held that he was not within the scope of the doctrine of seaworthiness because the work he was performing at the time of his accident and injuries

was not seamen's work; and this, even though he was later to ship out as second assistant engineer upon completion of reactivation. Cf. *Desper v. Starved Rock Ferry Co., supra.* The Court also held that a deactivated vessel in the custody and control of a ship repair contractor while undergoing reactivation is not a vessel in navigation subject to the warranty of seaworthiness. See also, *Berryhill v. Pacific Far East Lines*, 238 F. 2d 385 (9 Cir., 1956) affirming 138 F. Supp. 859, certiorari denied, 354 U. S. 938.

United States v. Lindgren, 28 F. 2d 725 (1928), affirmed 281 U. S. 38, discussed at pages 16-17 of Petitioner's Brief, was a suit to recover damages for the death of the third mate of the "Hybert". The principal question presented was whether his administrator could recover under the Virginia death statute or whether the sole remedy was under the Merchant Marine Act of 1920. The Court held that the 1920 Act was exclusive and that, since no dependents survived decedent (a prerequisite to suit under the 1920 Act) no recovery could be allowed. Decedent's administrator also argued the 1920 Act had no application on the grounds that decedent was not a seaman. The Court held that decedent's status as third mate and a seaman had been admitted in the pleadings and was conclusively determined thereby. The Court, as dicta, then stated that even ignoring the pleadings, the decedent, on the facts was a seaman. The facts recited do not set forth the extent of the repairs being carried out, the nature of decedent's services to the ship or to what extent reactivation had been completed.

Read v. United States, (3 Cir., 1953) 201 F. 2d 758, discussed in Petitioner's Brief at pages 19-20 is clearly distinguishable from the instant case. There a "live" vessel in navigation and with officers and crew aboard was delivered to a ship repair company for alterations to change its cargo capacity from freight to troop capacity. The contract called for the work to be done between May 23, 1944

and May 28, 1944 (five days). The vessel came from the sea seeking specialists services and returned to the sea six days later. Historically the work of readying a navigable ship for her next cargo is seamen's work. Though it does not specifically appear in the opinion, the record in the *Read* case establishes that the slip was a live one with officers and crew aboard at the time the alterations were being carried out.

The Courts below were clearly not in error in holding that the service performed by petitioner was not of the type or kind traditionally performed by seamen; that the "Mary Austin" was not unseaworthy, and there was no breach of the warranty of seaworthiness by the respondent.

II.

Petitioner Failed to Prove Negligence on the Part of Respondent.

The libel filed herein predicated liability upon the distinct and separate grounds of unseaworthiness and negligence.

We have previously demonstrated that under the applicable facts and appropriate law there was no vessel in navigation and the nature of the services performed by petitioner in relation to the vessel were not such as had been traditionally and historically performed by seamen. Petitioner, therefore, failed to make out a cause of action based upon unseaworthiness and dismissal of the libel on this ground was proper.

The trial court found that respondent, United States, was not guilty of negligence.

The evidence clearly supports the court's findings that the United States turned over to the reactivation repair contractor, Atlantic, a vessel that was a deactivated, drained, inert "dead" ship for complete overhaul. There was nothing in the condition of the "Mary Austin" at that time which could have caused petitioner's injury. It

was not until sometime later when a fellow employee of the petitioner turned on the water that altered conditions so as to cause the injury to petitioner.

The courts below held that respondent, United States, was under a duty to provide petitioner with a safe place to work and that this duty was a nondelegable one.

The trial judge held:

> "The question presented is the nature and extent of that duty. Unlike the distinct and sometime overlapping duty to provide a seaworthy vessel and appurtenances, a shipowner's duty to provide a safe place to work is not an absolute duty; rather, it is a requirement of reasonable care under the circumstances. Brabazon v. Belships Co., 3 Cir., 1953, 202 F. 2d 904, 906. It is not a unique and separate ground of liability but rather liability predicated upon negligence. Cookingham v. United States, 3 Cir., 1950, 184 F. 2d 213, see opinion of Chief Judge Kirkpatrick, D. C., E. Pa. 1949, 87 F. Supp. 203, 205". (143 F. Supp. 473, 480)

In affirming the action of the trial judge on this phase of the case, Judge Goodrich speaking for the 3rd Circuit held:

> "But the legal responsibility for the place in which a workman carries on activities is not an insurer's liability for safety but responsibility only for the exercise of reasonable care with regard to the premises at which work is done. It is a nondelegable duty but not an absolute one. It is rather a nondelegable obligation that reasonable care shall be used. This was pointed out with clarity by this Court in Barbazon v. Belships Co., 202 F. 2d 904 (3d Cir., 1953), and reiterated by us in Osnovitz v. United States, 204 F. 2d 654 (3d Cir., 1953).
>
> "So far as these premises were concerned there was no lack of safety. Even if the plug was loose that

did no harm to West or anyone else. The accident to West came because a fellow employee of the contractor did a positive and negligent act. For such superadded, affirmative conduct, the owner of the premises is not responsible. See 2 Restatement, Torts § 426 (1934)." (256 F. 2d 671, 672)

The Third Circuit in the *Brabazon* case, *supra*, relied upon the decision of this Court in *Baltimore & Ohio S. W. R. Co. v. Carroll*, 280 U. S. 491 (1930) wherein it was held:

> "The employer is not held to an absolute responsibility for the reasonably safe condition of the place, tools and appliances, but only to the duty of exercising reasonable care to that end. Seaboard Air Line v. Horton, 233 U. S. 492, 502; Yazoo & M. V. R. R. Co. v. Mullins, 249 U. S. 531, 533." (280 U. S. 491, 496)

Petitioner urges at pages 21-24 of his brief that the Courts below erred in qualifying the shipowner's duty to provide a safe place to work to one of reasonable care and in relating it to negligence rather than unseaworthiness.

It is submitted that failure to provide a safe place to work may be an element in the establishment of either unseaworthiness or negligence but that in and of itself it is not a distinct and separate ground of liability. See, *Cookingham v. United States*, 87 F. Supp. 203, 205.

Failure of the petitioner to make out a cause of action based upon unseaworthiness has been covered earlier in this brief.

Mahnich v. Southern Steamship Co., 321 U. S. 96 and *The Scandinavia*, 102 F. 2d 577 (6 Cir., 1939) cited and relied on by petitioner at page 22 of his brief are both cases of pure unseaworthiness.

Cromady v. The J. H. Fisser, 358 U. S. 423, cited and relied on at pages 23, 24 and 25 of petitioner's brief is clearly distinguishable from the case at bar. The unseaworthy condition of the vessel, i.e., the safety cut off device

on the winch being set to operate at a load slightly more than twice the safe-working load of the unloading gear; had been caused by employees of the ship before the winch was turned over to the petitioner's fellow employees for operation. 358 U. S. 423, 425, 426. The shipowner was held liable when the stevedores in unloading cargo brought the unseaworthy condition into play.

No such unseaworthy condition existed in the instant case.

Accordingly, the finding of the court below that respondent, United States, did not breach its duty to petitioner to provide him with a reasonably safe place to work is proper and should be affirmed.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

October Term, 1958.

No. 541.

EDGAR ALLEN WEST,

Petitioner,

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF COMMERCE, MARITIME ADMINISTRATION, et al.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Reply Brief for Petitioner.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF FOR PETITIONER.

Respondents' brief fails to meet the issues raised by petitioner. Instead, respondents attempt to attack the problem indirectly and introduce new theories which are not supported by the authorities cited, and are in direct conflict with the principles long established by the decisions of this court.

It is first argued that the warranty of seaworthiness does not apply to a vessel not in active navigation. This approach is apparently adopted from the defense which was asserted in *Atlas v. Interocean S. S. Co.*, 108 F. 2d 185; *Hauch v. American S. S. Co.*, 107 F. 2d 999; *Seward Wash Gravel Corp. v. McManigal*, 65 F. 2d 779. An examination of those decisions discloses, first, that these cases neither support the position of respondents nor are the issues in those cases similar to those at bar.

In *Antus v. Interocean S. S. Co., supra*, the suit was by an injured maritime worker claiming the benefit of the Jones Act along with the maritime law against his employer, the shipowner. The issue raised was whether the plaintiff was a "member of the crew" and therefore entitled to a damage remedy under the Jones Act, or whether he was a longshoreman whose remedy against his employer was limited to the Longshoremen's and Harbor Workers' Compensation Act.[1] In that case, the plaintiff had been a member of the crew of the vessel which had been engaged in navigation on the Great Lakes. With the arrival of the winter season and the freezing of the lakes, the vessel was taken out of service and laid up for the winter. The plaintiff, along with certain other men who had formerly been members of the crew, was retained for the sole purpose of laying up the vessel for the winter. The court held at page 187:

> [1] "After the enactment of the Jones Act in 1920 (46 U.S.C.A. 688), this court in *Chelentis v. Luckenbach Steamship Company*, 247 U.S. 372, held that the term 'seaman' as used in the Act embraced not only the regular ship's company, but also longshoremen and harbor workers who were engaged in the ship's service. Thus, longshoremen as seamen had the benefit of the Jones Act against their own employers, that is, the ship's company had the same benefits against the shipowner. This situation was changed by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 901 (1927), which Act provided that the rights of longshoremen against their own employers would be limited to compensation under the Act. It left unchanged the longshoremen's rights against the vessel and vessel owners. After the enactment of the Longshoremen's and Harbor Workers' Compensation Act, it became necessary in those cases where the longshoremen were directly employed by the shipowner to determine whether the workers on the ship were part of the ship's complement or "members of the crew," in which event they could have the benefits of the Jones Act, or if they were to be characterized as longshoremen who were not part of the ship's complement, although directly employed by the shipowner, in which event their remedy was limited to the Compensation Act. These recent situations were therefore directly responsible for the issues raised in such cases as *Antus v. Interocean S. S. Co., supra*, the others relied upon by the respondent here.

"Clearly if appellant at the time of the accident had been engaged in maritime work he would have been a seaman within the provisions of the statute. But the question is whether at the time of the accident he was engaged in maritime work, and the test is the nature of his employment at the time. While the work done had direct relation to navigation, it neither was performed during the navigation season, *nor was it even preparatory to navigation.*

* * *

The vessel, while not consigned to a ship's graveyard, was tied up to the piles. *Instead of doing this work in preparation for navigation, the men were preparing the vessels for winter quarters.*" (Emphasis ours.)

It is clear from that decision that if the injured worker had been engaged in preparing the vessel for sea instead of laying it up for the winter, his work would have been a maritime service in furtherance of navigation and he, therefore, would have been regarded as a member of the crew.

And, in *Hines v. American S. S. Co.*, 107 F. 2d 999, the vessel had been laid up and was being prepared for use as a storage place for soya beans. The plaintiff in that case was injured while engaged in that project. The court there held that preparing the vessel for storage purposes was not a maritime service in furtherance of navigation; that since no navigation was to follow the service in which the plaintiff was engaged, he could not be regarded as a member of the crew and, therefore, entitled to maintenance and cure, but was relegated to his remedy under the Compensation Act.

In *Seattle Wash. Girder Corp. v. McManigal*, 65 F. 2d 779, a watchman on a vessel which had been laid up for the winter was drowned, and his personal representative instituted a damage action under the Jones Act. The case was dismissed on the ground that the decedent was not a

"member of the crew" and, therefore, not entitled to the benefits of the Jones Act. The administrator then filed his claim under the Compensation Act and the defendant there reversed its position and contended that the maritime law applied to the exclusion of the Compensation Act. The court held that the watchman was not engaged in any service related to or in furtherance of navigation and that his activities on the vessel were not in anywise a maritime service, since the vessel was in a laid-up status for the winter. Accordingly, the court concluded that the decedent was not a member of the crew and that his remedy against the shipowner had been properly under the Compensation Act.

Thus, these cases do not stand for the proposition alleged by respondents that the warranty of seaworthiness cannot apply to injury on board vessels which are not in active navigation. On the contrary, these decisions clearly hold that where a vessel is being laid up, then such services are not in aid of or in furtherance of navigation and, therefore, are not maritime services. Under these circumstances a man injured in the course of such service may not claim the status of a member of the crew entitled to the benefits of the Jones Act against the shipowner, his employer. Those cases further unequivocally hold that where the services are designed, as in the case at bar, to prepare the vessel for sea, then such services are indeed in furtherance of navigation, and where the shipowner is the employer he may be held responsible under the Jones Act.

If the respondents were correct in their contention that the issues in their cited cases paralled the issue in the case at bar, it is nevertheless clear that the work in which petitioner was engaged was maritime in nature, since it must be conceded that all of the work on the vessel was being done to prepare it for sea. The contract for overhauling the vessel expressly so provides.

It must be noted, however, that the instant case poses a different issue. Here, plaintiff was employed by an inde-

pendent contractor, as in *Seas Shipping Company v. Sieracki*, 328 U. S. 85. He was not employed by the vessel owner. His suit against the shipowner, therefore, does not rest upon the Jones Act and he is, therefore, not required to establish himself as a "member of the crew." It is essential only that he show that he was performing services on board the vessel, which services were maritime in nature. In this case, the work of preparing the vessel for sea was clearly in furtherance of navigation and was therefore a maritime service.

Respondents also contend that the warranty of seaworthiness does not apply because the work in which petitioner was engaged was not "seaman's" work. In support of this contention, respondents repeatedly assert that the work in which petitioner was engaged involved "home port major structural repairs." It is significant that in no instance do respondents point to the evidence in support of this conclusion. A review of the contract in evidence decisively negates any suggestion that the work being done on this vessel involved any structural repairs, let alone major structural repairs. The contract demonstrates that the work generally involved an overhauling and cleaning of the vessel's equipment, and the repair or replacement of missing parts. All of this work has, since time immemorial, been regularly performed by seamen during and between voyages. In fact, the petitioner was employed because he was a licensed marine engineer who had served on vessels and was, therefore, familiar with the very work involved in this operation. At the time of his accident, he was working on equipment in a manner in which he had long been accustomed from active service on vessels as a marine engineer. There is thus no basis for respondent's oft repeated but never supported statement that the work on this vessel involved major structural repairs.

In this connection, consideration must be given to the dividing line, if any, in the type of repairs which are recognized to be "seamen's" work, as distinguished from "ship

building" work. Judge Learned Hand in *Berge v. National Bulk Carriers*, 251 F. 2d 717, considered that very point. There the entire interior of the vessel was torn out and, as the lower court found, "The work amounted to a virtual rebuilding of the interior of the vessel" (148 F. Supp. 611). Judge Hand found that the contract was not merely a repair job, but was one for a rebuilding of the vessel, as follows (p. 718):

> "The owner made a contract with Todd Shipyards Corporation to take the vessel to its own shipyard and *rebuild* her in accordance with approved plans and specifications." (Emphasis ours.)

In distinguishing between an overhauling and repairs, as in the instant case, and a rebuilding job as in the *Berge* case, Judge Hand went on to say at page 718:

> "Obviously there must be some limit, else the whole fabrication of a new ship would be included. We can only say that the *reconstruction* of a ship was not traditionally the task of the crew." (Emphasis ours.)

Assuming this distinction drawn by Judge Hand, which apparently respondents adopt, the facts in the case at bar fall clearly in the orbit of "seamen's" work. *See U. S. v. Lindgren*, 28 F. 2d 725, affirmed 281 U. S. 38. Respondents have not been able to point to a single part of the contract which involves structural repairs, which contract on the contrary calls for the cleaning and overhauling. This work has regularly been performed by members of the crew since the earliest days of merchant shipping.

Respondents seize upon the further argument that the shipowner in this case should not be held liable because the control of the repairs was lodged with the contractor, and the role of the United States, as shipowner, was limited to inspection of the work of the contractor. In support of this

contention, respondents rely upon *Guerrini v. U. S.*, 167 F. 2d 352 (2 Cir.). Respondents completely ignore the fact that the same court of appeals expressly recognized that the *Guerrini* case had been overruled by this court's decision in *Alaska S. S. Co. v. Petterson*, 347 U. S. 329.

In *Halecki v. United N. Y. and N. J. Sandy Hook Pilots Assn.*, 251 F. 2d 708, Judge Hand, in discussing this very issue which was presented in the *Halecki* case, disposed of the *Guerrini* case and the argument which is now presented, in these terms (p. 711):

> "In Guerrini v. United States, 2 Cir., 167 F. 2d 352, the ship, as in the case at bar, was moored in Brooklyn alongside a dock, and the libellant, an employee of a subcontractor, was engaged in cleaning her boilers and tanks, when he was hurt by slipping on a grease spot. We held that the doctrine of Seas Shipping Co. v. Sieracki, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, did not apply. *However, that was in 1948 before either Pope & Talbot v. Hawn, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143 or Petterson v. Alaska SS. Co., 347 U. S. 396, 74 S. Ct. 601, 98 L. Ed. 798, was decided; it is now clear that we were wrong both in limiting the warranty to those doing longshoremen's duties and in supposing that the surrender of 'control' of the ship was relevant.*" (Emphasis ours.)

As Judge Hand so clearly points out, the so-called "control theory" was specifically rejected by this court in *Petterson*, and respondents' argument on this point is, likewise, in direct conflict with the clear pronouncements of this court.

The record demonstrates that the "Mary Austin" had been taken out of her laid-up status in Norfolk, Virginia, and thereafter navigated under tow through the Chesapeake Bay and on the high seas along the East Coast into the Delaware Bay, and thereafter moored alongside a dock in the Port of Philadelphia for the general overhaul outlined

in the contract. From the time she was taken out of Norfolk and throughout the entire period that the vessel was being overhauled, she was manned by a master and five other ship's officers, who inspected the work as it progressed and who stood regular watches on the vessel during the operations.[2] The work itself did not involve any structural repairs, but was of a nature which traditionally had been performed by seamen. The captain and the other officers, as seamen, were delegated to inspect the work as it went along. Moreover, seamen, such as petitioner, were selected for the actual performance of the work because of their experience on merchant vessels. Thus, the actual performance of the work and its supervision were in the hands of regular merchant marine personnel who were familiar with the work by virtue of their experience in these same duties on board vessels. Upon these undisputed factual considerations, petitioner is entitled to the benefit of the warranty of seaworthiness.

In addition to the respondents' obligation for unseaworthiness, liability is also clear upon principles of negligence because of respondents' *non-delegable duty* to provide a safe place to work and a safe method of operation and procedures. See *United New York & N. J. Sandy Hook Pilots Assn. v. Halecki*, 3 L. Ed. 2d 541.

The decision of the court below should be reversed.

Respectfully submitted,

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[2] Respondents admitted in answer to interrogatories that these men were "members of the crew" of the Mary Austin during this entire period. (Supplemental answers to interrogatory No. 6.)